Supreme Court, U.S.
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No. 03-0314 42

IN THE

Supreme Court of the United States

EAGLE INSURANCE COMPANY and
NEWARK INSURANCE COMPANY,

Petitioners,

v.

BANKVEST CAPITAL CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOSEPH S.U. BODOFF*
EVAN SLAVITT
RICHARD P. O'NEIL
BODOFF & SLAVITT LLP
225 Friend Street
Boston, MA 02114
(617) 742-7300

* *Counsel of Record*

Attorneys for Petitioners

186888

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

Does 11 U.S.C. § 365(b)(2)(D) allow a bankruptcy trustee or debtor in possession to assume an executory contract or unexpired lease without curing or providing adequate assurance that it will cure **any** existing nonmonetary defaults?

LIST OF INTERESTED PARTIES

Petitioners:

Eagle Insurance Company

Newark Insurance Company

Respondent:

Bankvest Capital Corp.

Other Interested Parties:

Finova Loan Administration, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners, by and through their undersigned attorneys, hereby disclose that:

1. Newark Insurance Company ("Newark") is a nongovernmental corporate party and is a wholly owned subsidiary of Appellant, Eagle Insurance Company ("Eagle"). No publicly held corporation owns 10% or more of Newark's stock.

2. Eagle is a nongovernmental corporate party and is a wholly owned subsidiary of The Robert Plan Corporation ("Robert Plan"). No publicly held corporation owns 10% or more of Eagle's or Robert Plan's stock.

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STATEMENT OF JURISDICTION

This appeal arises out of a final order of the United States Bankruptcy Court for the District of Massachusetts, entered on December 12, 2001, denying the requests of Eagle Insurance Company ("Eagle") and Newark Insurance Company ("Newark") for the payment of cure costs pursuant to Section 365 of the Bankruptcy Code, a final order of the United States Bankruptcy Appellate Panel for the First Circuit, dated March 28, 2003, affirming the decision of the Bankruptcy Court, and a final order of the United States Court of Appeals for the First Circuit, dated March 15, 2004, affirming the decision of the Bankruptcy Appellate Panel. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

§ 365. Executory contracts and unexpired leases

> (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to –

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or
>
> (D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

11 U.S.C. § 365(a), (b)(1), (b)(2).

STATEMENT OF THE CASE

A. Introduction

Many, if not most, of the executory contracts faced by the bankruptcy courts contain significant nonmonetary provisions. Licenses, leases, and other contracts involving the temporary or partial transfer of rights, in particular, all contain provisions that do not directly relate to the payment of money but are essential components of the commercial transaction. Section 365 represents a calibrated balancing of the rights of the parties to executory contracts. This Court in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 79 L. Ed. 2d 482, 104 S. Ct. 1188 (1984) has, indeed, recognized that in a chapter 11 case, the rights of the debtor to be given a chance to reorganize are balanced against the interests of its creditors and their contractual rights. Unfortunately, as a result of the decision of the United States Court of Appeals for the First Circuit in this case, there is now an irreconcilable conflict in the circuits as to the interpretation of that

provision, dramatically shifting the balance that was adopted by the Ninth Circuit and throwing the bankruptcy courts into doubt and confusion. It is both appropriate and necessary for this Court to elucidate the meaning of this core provision of the Bankruptcy Code to further the intent of the legislation.

B. Procedural History

This appeal arises out of requests for the payment of cure costs (the "Cure Claims") filed by Eagle and Newark pursuant to the Fifth Amended Joint Liquidating Plan of Reorganization of the Debtor and the Official Committee of Unsecured Creditors (the "Plan") of BankVest Capital Corporation (the "Debtor" or "BankVest"), confirmed by the Bankruptcy Court on May 31, 2001. The Plan required that all parties to executory contracts and unexpired leases with the Debtor file their requests for payment of cure costs on or before the effective date (the "Effective Date") of the Plan. Eagle and Newark both filed timely Cure Claims, alleging claims based on BankVest's failure to deliver equipment under equipment leases in which BankVest was the lessor.

On August 15, 2001, Finova Loan Administration, Inc. ("Finova"), on behalf of the Debtor,[1] objected to the Cure Claims. On August 16, 2001, the Bankruptcy Court issued an order requiring the parties to submit memoranda of law on the issue of whether the claims of Eagle and Newark were "cure claims or something else." After receiving memoranda

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1. The Debtor and Finova entered into a stipulation, filed with the Bankruptcy Court on or about August 6, 2001, whereby Finova agreed to assume the Debtor's responsibility to defend the cure claims asserted by Eagle and Newark.

of law, the Bankruptcy Court held a non-evidentiary hearing on November 7, 2001. On December 12, 2001, the Bankruptcy Court entered a final order in which it concluded that Eagle and Newark have no cure claims that must be satisfied before the Debtor can assume and assign the Leases since the claims asserted by Eagle and Newark were based on nonmonetary defaults. The Bankruptcy Court concluded that § 365(b)(2)(D) provided an exception from the requirement in § 365(b)(1) that the trustee or debtor in possession cure all defaults upon the assumption of an executory contract or unexpired lease and concluded that that exception encompassed ***all*** nonmonetary defaults. In so doing, it adopted the interpretation of § 365(b)(2)(D) "that penalty rate obligation and a nonmonetary default are two separate types of breaches which a debtor is not required to cure prior to assumption of contract." App. 40a. It concluded, therefore, that BankVest is not required to cure its defaults prior to assumption nor provide adequate assurance that it would cure the defaults. At best, Eagle and Newark only had damage claims that might be asserted in a separate proceeding.

On December 21, 2001, Eagle and Newark filed timely notices of appeal to the United States Bankruptcy Appellate Panel for the First Circuit. After reviewing the extant cases, and with little further analysis, the Bankruptcy Appellate Panel, on March 28, 2003, entered judgment affirming the decision of the Bankruptcy Court. On April 16, 2003, Eagle and Newark filed timely a notice of appeal to the United States Court of Appeals for the First Circuit. The First Circuit affirmed on March 15, 2004, expressly rejecting the Ninth Circuit's decision in *In re Claremont Acquisition Corp.*, 113 F.3d 1029 (9th Cir. 1997) (the relevant portions of which are attached as Appendix D), which supported the position of Eagle and Newark.

C. Statement of Facts

For the purposes of this petition, the underlying facts, which the Bankruptcy Court assumed were true, are undisputed.[2] On or about May 27, 1999, Eagle and Newark entered into separate Master Equipment Lease Agreements (the "Eagle Lease" and the "Newark Lease" respectively, or collectively the "Leases") with the Debtor, pursuant to which Eagle and Newark were to lease from the Debtor approximately 190 pieces of computer equipment (the "Equipment") over a period of 48 months. App. 2a-3a. The rent payments under the Eagle Lease were $11,940.61 per month, and the rent payments under the Newark Lease were $10,111.82 per month. App. 3a.

At the time the Leases were entered into, each of the parties involved, including the Debtor, knew that the Debtor's vendor, Nortel, had not manufactured approximately 20 items of the Equipment. Therefore, Eagle and Newark made an arrangement with Nortel for the short-term loan of equipment with lesser capacity and intelligence, to hold them over until the new equipment was manufactured. The other leased items were delivered at or about the same time. Notably, the loaned items constituted the most critical components of the leased Equipment and accounted for 60 percent of the entire value of the leased goods.[3] App. 3a.

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2. While the court's decision was not a result of a motion to dismiss for failure to state a claim, it was akin to one. No evidence was taken in this case.

3. As an example, one of the items not delivered was an 8 Port Gig Module, whose value for a single unit was $13,311.00. Contrast this with the ***eleven*** Baystack 400-SRC Cascade Return Cables that were delivered and whose ***total*** value was $1,287.00.

On December 17, 1999, before BankVest had completed delivery of the Equipment and paid for any of it, an involuntary bankruptcy petition was filed against BankVest. No additional Equipment was delivered after the involuntary petition was filed. As a result, Eagle and Newark never received a substantial portion of the Equipment that the Debtor agreed to lease to them.[4] The failure to deliver the Equipment formed the basis of Eagle's and Newark's Cure Claims.

On June 15, 2001, Eagle and Newark filed their Cure Claims. In the Cure Claims, Eagle and Newark asserted that the Debtor's breaches of the Leases were such that they could not be cured. To the extent that the breaches could be cured, however, Eagle and Newark sought damages caused by the Debtor's failure to deliver a substantial portion of the Equipment. App. 5a-6a. Finova, on behalf of the Debtor, objected to the Cure Claims alleging that the claims do not relate to any outstanding obligations of the Debtor and that Eagle and Newark were merely seeking to preempt a lawsuit against them to collect outstanding lease payments.

Following a non-evidentiary hearing, the Bankruptcy Court held that Eagle and Newark do not have "cure claims

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4. BankVest has characterized Eagle's and Newark's position as a claim that the Equipment was "nonconforming." While Eagle and Newark disagree with this characterization, it is irrelevant for purposes of this petition. Whether the Equipment would be deemed to be nonconforming or not delivered, the distinction did not play into the decisions of any of the courts below. The courts held that all nonmonetary defaults, ***no matter what the type***, are excluded from § 365(b)(1)'s requirement that defaults be cured upon the assumption of an executory contract or unexpired lease.

to be satisfied before assumption and assignment of the leases." App. 40a. The Bankruptcy Court's decision assumes that the Debtor is in default and holds that, despite such defaults, the Debtor need not cure them as a condition to assumption of the Leases, something that is normally required by § 365(b)(1) of the Bankruptcy Code. App. 40a. The Bankruptcy Court held that § 365(b)(1)'s requirement that defaults be cured in connection with an assumption of an unexpired lease does not apply when the defaults are nonmonetary, no matter whether the default is central to the lease or merely incidental and no matter whether the remedy sought is compensatory or punitive. Holding that the failure to deliver the Equipment under the Leases constituted nonmonetary defaults, the Court concluded that the Debtor could assume the leases without delivering the Equipment or even providing adequate assurance that it would deliver it. *Id.* The Bankruptcy Appellate Panel agreed and affirmed. App. 30a-31a. The United States Court of Appeals for the First Circuit affirmed, expressly rejecting the Ninth Circuit's holding in *In re Claremont Acquisition Corp.*, *supra*.

REASONS FOR GRANTING THE PETITION

I. There Is Direct Conflict Between the Circuits

Unlike many of the cases that seek a writ of certiorari, this case presents a patent and unambiguous conflict between the circuits. As the First Circuit in the opening paragraph of its decision stated:

> The Ninth Circuit, in the only court of appeals opinion to address this question, held that non-monetary defaults must be cured before

> assumption *In re Claremont Acquisition Corp.*, 113 F.3d 1029, 1034-35 (9th Cir. 1997). In the proceedings below, the bankruptcy court and the Bankruptcy Appellate Panel (BAP) reached the opposite conclusion. **We disagree with the Ninth Circuit** and affirm.

App. at 2a (emphasis added).

There are now at least two – and arguably three – interpretations of § 365(b)(2)(D) that have been articulated by the courts. The first was set forth by the Ninth Circuit in *Claremont* (the relevant portions of which are attached as Appendix D). Under the Ninth Circuit's reading, the word "penalty" applies both to the word "rate" and to the word "provision". As the First Circuit explained, "[o]n [the *Claremont* court's] reading, Congress intended subsection (D) to read like this:

> (D) the satisfaction of any penalty rate [, or any penalty provision] relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

App. at 9a-10a. This reading was also accepted by *In re Williams*, 299 B.R. 684, 686 (Bankr. S. D. Ga. 2003); *In re New Breed Realty Enters.*, 278 B.R. 314, 320 (Bankr. E.D.N.Y. 2002); and *In re Vitanza*, No. 98-19611DWS, 1998 WL 808629 at *21 n.44 (Bankr. E.D. Pa. Nov. 13, 1998). Under this exegesis, the focus of the section is on the concept of a "penalty." Whether the penalty is embodied in a monetary rate or a nonmonetary consequence or event, subsection (D) only applies if the court finds some punitive consequence in

requiring the debtor to comply with the contractual provision. If the provision is not punitive, then the trustee or debtor in possession must cure the problem before assuming the contract. Inherent in this approach is the notion that there is a panoply of nonmonetary provisions (performance obligations) that are essential to the executory contract, which Congress intended that the trustee or debtor in possession perform if it wants to reap the benefits thereof.

In contrast, the First Circuit asserted that the word "penalty" describes only the term "rate" and that, therefore, the second half of subsection (D) creates an entirely distinct and independent exception for failure to perform nonmonetary obligations. The paragraph would then be read:

> (D) the satisfaction of any penalty rate [, or any] provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

App. at 10a. Following this line of analysis are *In re Walden Ridge Dev., LLC*, 292 B.R. 58, 67 and n.2 (Bankr. D.N.J. 2003); *In re W. Pac. Airlines, Inc.*, 219 B.R. 298, 304 (Bankr. D. Colo.) *rev'd on other grounds*, 219 B.R. 305 (D. Colo. 1998); and *In re GP Express Airlines, Inc.*, 200 B.R. 222, 233-34 (Bankr. D. Neb. 1996). This approach sees two different ideas comprised by subsection (D). First, the trustee or debtor in possession need not cure punitive rates imposed by a contract – for example, a penalty rate of interest on unpaid obligations. Second, and independently, the First Circuit reading would allow trustees or debtors in possession to assume a contract without curing nonmonetary defaults of any kind, whether punitive or not. In the complex

world of leasing and licensing, nonmonetary obligations encompass most of the terms of contracts and leases executed in the marketplace.

These two positions cannot be reconciled. Either the exception to the cure requirement is limited to penalties, whether they relate to monetary rates or nonmonetary obligations, or it creates two entirely unrelated exceptions – one for penalty rates and the other for all nonmonetary obligations, including the most commercially reasonable ones. Nor does either reading result from a commercial arrangement unique to this particular case. Instead, both purport to be decisions of general applicability and have since been argued or relied on as such. *See, e.g.*, *In re Williams*, 299 B.R. 684 (Bankr. S.D. Ga. 2003) (citing the *BankVest* Bankruptcy Appellate Panel decision), *In re Walden Ridge Development, LLC*, *supra* (citing the *BankVest* Bankruptcy Court decision).

II. The Conflict Will Not Easily Be Resolved Without Supreme Court Determination

There are several reasons that a proper – or even uniform – interpretation of § 365(b)(2)(D) will not come about without intervention by this Court. The fundamental problem is that the statutory provision in question – § 365(b)(2)(D) – is poorly worded. The court below observed that "[n]othing in the language or syntax of § 365(b)(2)(D) unambiguously requires either outcome." App. at 11a. The Ninth Circuit was more attracted to a grammatical analysis, but engaged in such parsing only because the face of the statute lacked clarity. There is no reason to believe that, in the absence of this Court's direction, future circuit decisions will have any tendency to coalesce based on additional textual refinement.

As noted earlier, a number of bankruptcy courts have lined up on both sides of the issue, with no additional light having been shed on the problem.

Indeed, it is far from clear that *Claremont* and *BankVest* have exhausted the possible readings of the subsection. The Fourth Circuit has offered, *en passant*, an arguably different explanation, when it stated, "Recent amendments also provide that the landlord may not charge the debtor the default rate of interest under the contract or lease when the default with which the debtor is charged is nonmonetary in nature." *In re Shanga-La, Inc.*, 167 F.3d 843, 848 n.3 (4th Cir. 1999). While not entirely clear, this reading of the subsection, seemingly ties "default rate" and nonmonetary default together in a way that excludes from the cure requirement nonmonetary – but punitive – default provisions but ***requires*** the cure of punitive rates where the underlying default is monetary.

Yet another explanation – and perhaps the best explanation – not yet adopted in a published opinion, begins with the introductory language of subparagraph (2), which provides that subparagraph (1) of the subsection "does not apply to a default that is a breach of a provision ***relating to*** . . ." (emphasis added) either of the possibilities set forth in subsection (D). Neither the First, Fourth, or Ninth Circuit's interpretation explains the function of the highlighted language in the context of a nonmonetary default, nor do any of the bankruptcy court decisions on this topic discuss that issue. The use of the phrase "relating to" in the introductory language may be read – and, the petitioners believe, should be read – to protect debtors from satisfying provisions that impose a derivative penalty that is a consequence of a nonmonetary default while still requiring

the cure of the underlying nonmonetary default itself. This reaches a similar result to the *Claremont* court, but gives meaning to all the words of the statute and avoids the practical problems set forth by the First Circuit. For example, if a licensee is subject to a "use" provision that limits the scope of its ability to use certain technology – a common patent licensing provision – and violation of that provision triggers liquidated damages of $10,000 per day, § 365(b)(2) would require the debtor to cease violation of the use provision (that is, the provision relating to default of a nonmonetary obligation specified in subsection (2)(D)) but permit assumption without payment of the liquidated damages clause (the provision relating to the provision relating to the default of a nonmonetary obligation specified in subsection (2)). Similarly, a clause providing for a forfeiture in the event of a breach of the same use provision might not be enforceable, yet the trustee or debtor in possession might still have to correct the underlying default by bringing the use in conformance with the license agreement.

As a result, the issue is not one that will eventually accrue a majority of circuits on one side or another and, thereby, converge on one interpretation. Instead, the courts are most likely to fractionalize into multiple overlapping or conflicting readings, no one of which will garner consensus.

Second, although there is some legislative history on the provision in question, it is scant at best. *See Claremont* at 1034, App. at 53a (Ninth Circuit notes "limited legislative history"). Indeed, the First Circuit found it to be without any value. App. at 12a ("legislative history of § 365(b)(2)(D) is not instructive."). Thus, to the extent that the courts can, in general, rely on legislative history to decipher ambiguous language, it has already been rejected by the First Circuit

and therefore is unlikely to contribute to a harmonization of the future understanding of the subsection.

Third, neither the Ninth Circuit's reading of the statute nor the First Circuit's are entirely satisfactory; each interpretation creates its own set of problems. The First Circuit chose to highlight the problems with the Ninth Circuit's interpretation of the statute but totally ignored the problems with its own interpretation, as well as some important policy reasons why such interpretation is incorrect. At least part of the difficulty arises from the multiple goals and focuses of the Bankruptcy Code. Unlike many statutes that have a narrow and explicit purpose, the Bankruptcy Code embodies a spectrum of concerns, values, objectives, and core precepts. This balancing of interests not only pervades the Code in general, it is inherent in § 365 itself, as recognized by this Court in *NLRB v. Bildisco & Bildisco*, *supra*, discussed at page 15-16, *infra*. In the absence of a polestar purpose that can be used to guide the interpretation of problematic sections, any given circuit panel or district judge will have different impulses depending on their individual reactions to the multipolar balancing implicit in the section. As a result, the outcome will vary not only according to the circuit, but even to the particular panel that considers the matter. Put another way, the First Circuit's exegesis of the statutory language and bankruptcy policy – and particularly its spotlight on the issue of "historical facts" is not without any merit, but ultimately is neither conclusive nor necessarily suasive to other courts.

In the absence of definitive interpretation by this Court, the split among the federal courts will only fester and worsen.

III. The Issue Relates to Fundamental Statutory Interpretation and Congressional Intent

At issue is the interpretation of a federal statute that can and should be applied uniformly throughout the United States. The provision in question is at the heart of the bankruptcy process. Section 365 has application in almost every corporate reorganization under Chapter 11 and every business bankruptcy case under Chapter 7, often with profound implications for the estate and the other participants. Thus, this Court has a significant interest in providing a definitive construction of the terms of part of the Bankruptcy Code, one of the most pervasive and detailed exercises of federal legislation. Whatever the conclusion the Court reaches, all parties to contracts will be able to adjust their commercial expectations in a uniform and consistent way. It is not fair to anyone to have conflicting outcomes of such a basic issue result from unresolved and antagonistic understanding of federal law.

Further, the matter requires the determination of significant issues of congressional intent in the absence of clear linguistic or legislative history guideposts. Section 365 represents a calibration and balancing of complex and potentially conflicting rights and obligations. This Court has stated that the ultimate goal of Chapter 11 is to promote a successful reorganization, but at the same time has recognized that success needs to take into account the rights of creditors as well as the debtor. In *NLRB v. Bildisco & Bildisco*, *supra*, this Court stated:

> Since the policy of Chapter 11 is to permit successful rehabilitation of debtors, rejection should not be permitted without a finding that

> that policy would be served by such action. The Bankruptcy Court must make a reasoned finding on the record why it has determined that rejection should be permitted. ***Determining what would constitute a successful rehabilitation involves balancing the interests of the affected parties – the debtor, creditors, and employees.*** The Bankruptcy Court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees. ***In striking the balance, the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardship each may face.***

465 U.S. at 527 (emphasis added). Thus, this Court has made pellucid that § 365 represents a convergence of multiple interests and goals. Nonetheless, the lower courts have struggled with the paucity of resources to understand the nature of such balancing as is embodied in § 365(b)(2)(D). The confluence of a profound need to implement congressional purpose and a lack of definitive authority to discern such purpose calls out for intervention by this Court.

Put another way, this is not one of those situations in which any answer, as long as it is clear and uniform, will do. To implement the delicate harmonization of intersecting concerns inherent in this section, the federal courts must arrive at an interpretation that meets all of the implicit purposes of the law. Only this Court can issue an opinion

that will instruct the courts as to the application of § 365(b) to carry out the legislative intent.

IV. Section 365 Affects Numerous Parties in Many Contexts Nationwide

There are substantial numbers of commercial entities who will be at risk of arbitrarily different outcomes. The number and type of executory contracts that are handled within the United States Bankruptcy Courts is large and varied. This problem, therefore, also has importance because it will affect a substantial number of entities throughout the United States. A few examples may suffice to demonstrate the ubiquity of the issue.

- Auto lessors will find the First Circuit's ruling troublesome. Such nonmonetary defaults as failure to maintain insurance, vehicle in the possession of a third party, and vehicle taken out of the jurisdiction are essential terms of the contract. In states where vicarious liability is applied to lessors, compliance with nonmonetary provisions is extremely important.

- In the franchise arena, it creates enormous difficulty to allow assumption of license agreements without a cure of the non-monetary provisions. In this context, licensors and franchisors value the nonmonetary provisions in some cases more than the monetary ones because they relate to the core value of their product.

- Almost every software license contains critical nonmonetary obligations to keep the software functional and updated. The failure of a debtor to do so robs the other party of much, sometimes all, of the value of their bargain.

- It is now common for contracts to contain detailed provisions regarding the handling of hazardous materials or wastes to avoid liability imposed on – and even criminal prosecution of – the contracting parties. Such obligations are inherently executory. To allow debtors to assume contracts without requiring compliance would create catastrophic results, particularly because the automatic stay would prevent prosecution of injunction actions without the permission of the very same bankruptcy court that would have just permitted assumption of the contract.

- Many construction and repair contracts contain detailed provisions relating to documentation of the work performed and setting forth safety standards. To permit a debtor to assume a contract without coming into compliance with such requirements would call into question the viability of the project itself.

- As noted above, various types of licenses and other financial arrangements contain scope or use limitations. At present, the enforceability of such provisions as a condition for assumption is now entirely dependent on the location of the bankruptcy.

Additional examples of the importance of this issue could be listed without difficulty. This is consistent with the First Circuit's own characterization of the issue as an "important question." As a result, the First Circuit's decision and the legal issue it embodies are more than sufficiently important to merit Supreme Court review.

V. The Exclusions in Section 365(b)(2) Are Incorporated Into a Number of Other Bankruptcy Code Provisions

Section 365(b)(2)(D) does not stand in isolation in the Bankruptcy Code. Thus, while it dictates what defaults must be cured in connection with an assumption of an executory contract or unexpired lease, its interpretation also determines what obligations must be complied with prior to assumption and whether the obligations need to be satisfied under a Chapter 11 plan of reorganization. Section 365(d)(3) provides that "[t]he trustee shall timely perform all the obligations of the debtor, ***except those specified in section 365(b)(2)***, arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected." 11 U.S.C. § 365(d)(3) (emphasis added). Similarly, § 365(d)(10) provides that

> [t]he trustee shall timely perform all of the obligations of the debtor, ***except those specified in section 365(b)(2)***, first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an expired lease of personal property . . . until such lease is assumed or rejected.

11 U.S.C. § 365(d)(3) (emphasis added). And, section 1124(2) treats a claim as unimpaired if, among other things, the Chapter 11 plan of reorganization "cures any . . . such default

that occurred before or after the commencement of the case under this title, ***other than a default of a kind specified in section 365(b)(2) of this title***." 11 U.S.C. § 1124(2)(A) (emphasis added).

Because of the dependence of other provisions of the Bankruptcy Code on the interpretation of § 365(b)(2)(D), the failure to address the conflict in the circuits not only will leave uncertain the rights and obligations of the trustee or debtor in possession on the one hand and the non-debtor contracting party on the other hand with regard to what obligations must be satisfied ***upon assumption***, but also, pursuant to §§ 365(d)(3) and 365(d)(10) what obligations must be satisfied pending assumption or rejection. Other questions flow from this as well. For example, does this mean that a trustee or debtor in possession can ignore all nonmonetary obligations in a lease prior to assumption notwithstanding the broad direction in §§ 365(d)(3) and 365(d)(10) to abide by the terms of the lease? In the Chapter 11 plan confirmation process, § 1124(2) makes it clear that how one interprets section 365(b)(2)(D) will affect the parties' rights long after the Chapter 11 plan is confirmed. Because unimpaired creditors are deemed to have voted for the plan of reorganization,[5] it is beyond question that Chapter 11 debtors will argue that they can force the counter-party to the contract to continue with the contract without cure or any compensation whatsoever. While the First Circuit's opinion seems to preserve the right to raise the claim separate and apart from the assumption proceeding, that decision, when read in conjunction with § 1126(2)(A), may actually preclude that right.

5. Section 1126(f) provides that "a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan." 11 U.S.C. § 1126(f).

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court grant review of this matter.

Respectfully submitted,

JOSEPH S.U. BODOFF*
EVAN SLAVITT
RICHARD P. O'NEIL
BODOFF & SLAVITT LLP
225 Friend Street
Boston, MA 02114
(617) 742-7300

Attorneys for Petitioners

* *Counsel of Record*

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED MARCH 15, 2004

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 03-9006

IN RE BANKVEST CAPITAL CORP.,

Debtor.

EAGLE INSURANCE COMPANY and NEWARK INSURANCE COMPANY,

Appellants,

v.

BANKVEST CAPITAL CORP.,

Appellee.

APPEAL FROM THE UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

Before
Lynch, Circuit Judge,
Campbell, Senior Circuit Judge,
and Lipez, Circuit Judge.

March 15, 2004

Appendix A

LYNCH, *Circuit Judge.* This case presents a narrow but important question of statutory interpretation under the Bankruptcy Code: whether 11 U.S.C. § 365(b)(2)(D) permits the debtor-in-possession to assume an unexpired lease without first curing nonmonetary defaults. The Ninth Circuit, in the only court of appeals opinion to address this question, held that non-monetary defaults must be cured before assumption. *In re Claremont Acquisition Corp.*, 113 F.3d 1029, 1034-35 (9th Cir. 1997). In the proceedings below, the bankruptcy court and the Bankruptcy Appellate Panel (BAP) reached the opposite conclusion. We disagree with the Ninth Circuit and affirm.

I.

For purposes of this appeal, we accept the facts as alleged by appellants.[1] BankVest Capital Corporation, the debtor and appellee in this action, was in the business of originating, securitizing, selling, and servicing equipment leases. On May 27, 1999, appellants Eagle Insurance Company and Newark Insurance Company entered into separate but substantially similar lease agreements with BankVest.[2] BankVest agreed to lease 190 specified items of

1. This appeal arises from a special proceeding established under BankVest's confirmed Chapter 11 plan for the determination of cure costs under 11 U.S.C. § 365(b). The bankruptcy court treated the debtor's motion in opposition to appellants' claim for cure costs essentially as a motion to dismiss, accepting appellants' allegations of fact as true for purposes of the assumption analysis under § 365. Neither party has contested that sensible approach and we adopt it here.

2. The leases also named as a lessor LeaseVest Capital Corporation, a wholly owned subsidiary of BankVest. LeaseVest subsequently assigned its rights under the leases to BankVest.

computer equipment to each of the appellants for a term of 48 months. Under the leases, Eagle and Newark were obligated to make monthly rental payments of $10,111.82 and $11,940.61, respectively. BankVest agreed to arrange for delivery of the equipment directly from Nortel, the manufacturer.

Eagle and Newark were aware, however, that Nortel would not complete production of twenty of the 190 items until several months after the start of the lease term. Those twenty items, Eagle and Newark say, collectively accounted for 60% of the entire value of the leased goods and constituted the most critical pieces of equipment. Accordingly, it was agreed that Nortel would provide appellants with substitute "loaner" equipment until those twenty items were completed and delivered.[3] Nortel delivered the leased equipment, including the substitute items, in August 1999. On August 25, Eagle and Newark executed certificates of acceptance acknowledging their receipt of the leased equipment in operating condition.[4]

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3. BankVest denies that it was a party to the loaner arrangement and questions whether that arrangement actually occurred. BankVest says that Eagle and Newark unconditionally accepted all 190 items as delivered; that they never claimed the allegedly substitute equipment was defective or inferior; and that they in fact used those twenty items for two years without complaint.

4. Eagle and Newark argued to the bankruptcy court that they were forced to sign the certificates of acceptance before Nortel actually delivered the leased equipment, so they should not be estopped from asserting a defense of non-delivery if BankVest sues to recover unpaid rent. Like the bankruptcy court, we do not reach the estoppel question.

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On December 17, 1999, before the loaner equipment could be replaced, an involuntary Chapter 11 petition was filed against BankVest in the United States Bankruptcy Court for the District of Massachusetts. BankVest did not contest the petition, and the bankruptcy court entered an order for relief on January 25, 2000. Once in bankruptcy, BankVest proposed a plan of reorganization that contemplated a gradual liquidation of its assets. After several revisions, the bankruptcy court confirmed the plan on May 31, 2001. Meanwhile, Eagle and Newark continued to use the leased computer equipment but paid no rent to BankVest, accumulating a collective arrears of approximately $1 million. That debt remains unpaid.

This appeal arises out of the provisions in BankVest's confirmed Chapter 11 plan that govern the assumption of BankVest's unexpired equipment leases. The plan provides that every equipment lease in which BankVest is the lessor shall be deemed assumed by the estate under 11 U.S.C. § 365 unless (1) the lease is specifically rejected or (2) any party to the lease files a claim for cure costs. In the event a claim for cure costs is made, the plan permits BankVest to defer its decision whether to assume or reject the lease until the bankruptcy court determines the amount of the cure costs, if any, that the estate would be obligated to pay upon assumption.[5] *See* 11 U.S.C. § 365(b)(1).

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5. Specifically, paragraph 7.1 of the confirmed plan provides:

> All equipment leases, in which the Debtor is lessor, . . . shall be deemed assumed upon the Effective Date [of the plan] unless specifically rejected on or before such

(Cont'd)

Appendix A

On June 15, 2001, Newark and Eagle filed timely claims for cure costs under this procedure. They charged that BankVest had defaulted on the leases by failing to replace the loaner equipment with the final twenty items from Nortel.[6] Further, they contended that this non-monetary default was an historical fact not susceptible to cure (i.e., nothing BankVest could do would remedy its historical failure to deliver the equipment on time). In the alternative, Newark and Eagle argued that if the estate were allowed to cure, they would each be entitled to damages in excess of

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(Cont'd)

> date . . . , or unless a claim is made on or before the Effective Date that assumption hereunder requires the Debtor to pay Cure Costs to any party to an assumed contract or lease. In the event a claim for Cure Costs is made, the time for the Debtor to assume or reject any such contract or lease shall be extended until such time as the Bankruptcy Court enters a Final Order as to the Claimant's entitlement to Cure Costs and the amount of such Cure Costs, at which time the Debtor may determine whether to assume or reject such contract or lease.

The plan defines "Cure Costs" as "[t]hose payments and assurances required upon assumption of an executory contract or unexpired lease pursuant to 11 U.S.C. § 365(b)(1)."

6. Newark and Eagle also argued that BankVest's failure to deliver this equipment voided the leases entirely, so that there remained nothing to assume. The bankruptcy court did not address this issue, however, and appellants have not raised it on appeal. Accordingly, we will assume that appellants' leases are "executory contracts or unexpired leases" within the meaning of 11 U.S.C. § 365. *Cf. Gallivan v. Springfield Post Rd. Corp.*, 110 F.3d 848, 851 (1st Cir. 1997) (discussing the meaning of "executory").

$300,000, as well as reductions in the rent payments owed to BankVest. Finova Loan Administration, Inc., filed an objection to appellants' cure claims on behalf of the estate on August 15, 2001.[7]

Treating Finova's objection as a motion to dismiss, the bankruptcy court held a non-evidentiary hearing on November 7, 2001. On December 11, 2001, the court dismissed appellants' cure claims on a ground not raised by either party: that 11 U.S.C. § 365(b)(2)(D) permits the debtor-in-possession[8] to assume an executory contract or unexpired lease without first curing nonmonetary defaults. *In re BankVest Capital Corp.*, 270 B.R. 541, 543 -7- (Bankr. D. Mass. 2001). Because BankVest was not in default on any monetary provision – indeed, all of the payments under the leases flowed to BankVest, not from it – the court held

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7. On August 6, 2001, Finova and BankVest (in its capacity as debtor-in-possession) filed a stipulation with the bankruptcy court whereby Finova assumed BankVest's responsibility to defend appellants' cure claims. Since that time, Finova itself has filed for bankruptcy protection; U.S. Bank Portfolio Services has succeeded Finova on BankVest's behalf.

8. Section 365 speaks only of "the trustee," but in a Chapter 11 case, the debtor-in-possession enjoys all the rights and powers of the trustee. 11 U.S.C. § 1107(a). The debtor-in-possession is the "same entity which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have done absent the bankruptcy filing." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) (internal quotation marks omitted). For brevity and convenience, this opinion refers to BankVest in its capacity as debtor-in-possession simply as "the debtor."

that there were no cure claims that had to be satisfied before assumption. *Id.* at 544. The BAP affirmed on the same ground. *In re BankVest Capital Corp.*, 290 B.R. 443, 447-48 (B.A.P. 1st Cir. 2003). Eagle and Newark timely appealed.

II.

This court has jurisdiction over appeals from the BAP under 28 U.S.C. § 158(d). We review the bankruptcy court's conclusions of law de novo, with the benefit of the BAP's bankruptcy expertise but without deference to its conclusions. Fed. R. Bankr. P. 7052; *In re Werthen*, 329 F.3d 269, 272 (1st Cir. 2003).

A. Legal Background

The dispute in this case concerns what is, in effect, an exception to an exception to the usual rule under 11 U.S.C. § 365. Section 365 generally allows the trustee in bankruptcy -- or, as in this case, the debtor-in-possession – to assume or reject any prepetition executory contract or unexpired lease, subject to the approval of the bankruptcy court. § 365(a); *In re FBI Distrib. Corp.*, 330 F.3d 36, 42 (1st Cir. 2003). This is one of the basic reorganizational tools available to debtors under the Bankruptcy Code. "[T]he authority to reject an executory contract is vital to the basic purpose [of] a Chapter 11 reorganization, because [it] can release the debtor's estate from burdensome obligations that can impede a successful reorganization." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). Under the Code, a rejected contract is considered to have been in breach prior to the bankruptcy petition, leaving the nondebtor party to the contract with a

general unsecured claim for contract damages. 11 U.S.C. §§ 365(g)(1), 502(g); *FBI Distrib.*, 330 F.3d at 42. If the debtor assumes a contract, however, it accepts both the burdens and the benefits of the bargain, and any liabilities incurred in the contract's postpetition performance will be treated as administrative expenses with priority status. *See* 11 U.S.C. § 507(a)(1) (priority for administrative expenses); *FBI Distrib.*, 330 F.3d at 45. By permitting debtors to shed disadvantageous contracts but keep beneficial ones, § 365 advances one of the core purposes of the Bankruptcy Code: "to give worthy debtors a fresh start." *In re Carp*, 340 F.3d 15, 25 (1st Cir. 2003). There are, however, a variety of restrictions on the debtor's power to assume executory contracts and unexpired leases. Most relevant to this case is § 365(b), which provides that if the debtor has defaulted on a contract prior to assumption, the debtor cannot assume that contract unless it (1) cures the default; (2) compensates the nondebtor party for any actual pecuniary losses resulting from the default; and (3) provides adequate assurance of future performance under the contract.[9] § 365(b)(1). Like the bankruptcy court, we will assume *arguendo* that BankVest's failure to replace the loaner equipment constituted such a default. Yet the requirement in § 365(b)(1) that the debtor cure defaults prior to assumption itself has exceptions. Section § 365(b)(2) provides:

> (2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to –

9. If cure and compensation are not feasible prior to assumption, the debtor may provide "adequate assurance" that it will do so promptly afterwards. 11 U.S.C. § 365(b)(1).

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. . .

> (D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

The bankruptcy court held, and the parties do not dispute, that BankVest's failure to deliver certain equipment is a "quintessential example of a nonmonetary default" within the meaning of subparagraph (2)(D). 270 B.R. at 544. The question on appeal is whether subparagraph (2)(D) excuses BankVest from the obligation that it otherwise bears under paragraph (1) to cure that default before assumption.

B. Interpretation of § 365(b)(2)(D)

(1) *Plain text*

As in any statutory interpretation case, we start with the text of the statute. *In re Hart*, 328 F.3d 45, 48 (1st Cir. 2003). The language of § 365(b)(2)(D) can plausibly be interpreted in at least two ways. Eagle and Newark argue that the word "penalty" in subparagraph (2)(D) describes both "rate" and "provision." On their reading, Congress intended that subparagraph to read like this:

> (D) the satisfaction of any penalty rate[, *or any penalty provision*] relating to a default arising from any failure by the debtor to

> perform nonmonetary obligations under the executory contract or unexpired lease.

This is essentially the interpretation that the Ninth Circuit endorsed in *In re Claremont Acquisition Corp., supra*, and a number of bankruptcy courts have since followed suit, *see, e.g., In re Williams*, 299 B.R. 684, 686 (Bankr. S.D. Ga. 2003); *In re New Breed Realty Enters.*, 278 B.R. 314, 320 (Bankr. E.D.N.Y. 2002); *In re Vitanza*, No. 98-19611DWS, 1998 WL 808629, at *21 n.44 (Bankr. E.D. Pa. Nov. 13, 1998).[10]

BankVest, on the other hand, argues that the word "penalty" describes only the term "rate," and that the second half of subparagraph (2)(D) creates a distinct exception for nonmonetary defaults. On this view, the statute is best interpreted like this:

> (D) the satisfaction of any penalty rate[, *or any*] provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

This is the interpretation favored by the bankruptcy court and the BAP below, as well as by the district court in the *Claremont* case. *See In re Claremont Acquisition Corp.*, 186 B.R. 977, 990 (C.D. Cal. 1995); *see also In re Walden Ridge Dev., LLC*, 292 B.R. 58, 67 & n.2 (Bankr. D.N.J. 2003); *In re W. Pac. Airlines, Inc.*, 219 B.R. 298, 304 (Bankr. D.

10. BankVest does not contend that its obligation to deliver the leased equipment was a "penalty provision."

Colo. 1998), *rev'd on other grounds*, 219 B.R. 305 (D. Colo. 1998); *In re GP Express Airlines, Inc.*, 200 B.R. 222, 233-34 (Bankr. D. Neb. 1996). If the plain language of the Bankruptcy Code required either of these interpretations, that would end the matter. *Lamie v. United States Trustee*, 124 S. Ct. 1023, 1030 (2004). But we see no textual basis for preferring appellants' interpretation to the one adopted by the bankruptcy court, which strikes us as equally consistent with the text. Nothing in the language or syntax of § 365(b)(2)(D) unambiguously requires either outcome. Indeed, we are hard-pressed to endorse any "plain meaning" argument where, as here, other federal courts have reached conflicting answers to the same question based on the same "plain" language. *Compare Claremont*, 113 F.3d at 1034, *and Williams*, 299 B.R. at 686, *with BankVest*, 290 B.R. at 447, *and Claremont*, 186 B.R. at 990. [11]

11. Eagle and Newark conspicuously have not urged this court to adopt the Ninth Circuit's textual analysis. In *Claremont*, the Ninth Circuit concluded that construing subparagraph (2)(D) to create a distinct exception for non-monetary defaults would be "grammatically incorrect and nonsensical" because the statute becomes grammatically incoherent if one simply deletes the words "satisfaction of any penalty rate." 113 F.3d at 1034. Even if that argument were properly before us, we would reject it. The text of § 365(b)(2)(D) is awkward and ungrammatical on any reading, including the reading that appellants urge; it proves nothing to say that the statute remains syntactically flawed when whole clauses are omitted. In any event, "the task of statutory interpretation involves more than the application of syntactic and semantic rules to isolated sentences." *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 101 (1st Cir. 1999). The wiser methodology, and the one that we employ here, is to interpret Congress's words in light of the goals and underlying policies of the statute as a whole. *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 116 (1st Cir. 2003); *In re Weinstein*, 272 F.3d 39, 48 (1st Cir. 2001).

With a simple comma or two, Congress could have made its preferred interpretation clear. But the Code as written is ambiguous, so we must divine Congress's intent from other sources. *See In re Weinstein*, 272 F.3d 39, 48 (1st Cir. 2001) (where the Bankruptcy Code is ambiguous, courts look to "its historical context, its legislative history, and the underlying policies that animate its provisions"); *In re Christo*, 192 F.3d 36, 39 (1st Cir. 1999).

(2) *Legislative history*

The legislative history of § 365(b)(2)(D) is not instructive. Congress inserted subparagraph (D) as part of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. Eagle and Newark place great weight on the single sentence in the legislative history of that Act that pertains to § 365(b)(2)(D):

> Finally, section 365(b) is clarified to provide that when sought by a debtor, a lease can be cured at a nondefault rate (i.e., it would not need to pay penalty rates).

H. Rep. No. 103-835 (parenthetical in original), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3359. From this, appellants conclude that Congress must have intended subparagraph (2)(D) to address "penalty" provisions only. The *Claremont* decision likewise points to this legislative history as evidence "that Congress intended only to relieve debtors of the obligation to pay penalties." 113 F.3d at 1034.

We disagree. At best, the legislative history indicates that Congress intended § 365(b)(2)(D) to free debtors from lease provisions requiring the payment of penalty *rates* – something that both parties here agree that it does. [12] But subparagraph (2)(D) also refers to non-monetary defaults, and the legislative history does not indicate what Congress intended by that reference. To interpret the House Report's explanation of one clause of subparagraph (2)(D) as a limitation on the scope of a different, unmentioned clause would "overstate[] the inferences that can be drawn from an ambiguous act of legislative drafting." *Martin* v. *Hadix*, 527 U.S. 343, 357 (1999) (refusing to limit the scope of a statute by negative implication from the legislative history). Like the statutory text, the legislative history simply offers no guidance on the question that divides the parties.

Eagle and Newark also point to pending bankruptcy reform legislation that, they say, would codify their interpretation of subparagraph (b)(2). That is both untrue and unhelpful. For several years Congress has debated versions of the so-called Bankruptcy Abuse Prevention and Consumer Protection Act. None has yet passed. The most recent version of which we are aware, introduced in February 2003 by

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12. Even this much was not always clear, as the text of § 365(b)(2)(D) could be read, by negative implication, to require debtors to pay penalty rates arising from *monetary* defaults. *See In re Phoenix Bus. Park Ltd. P'ship*, 257 B.R. 517, 521 (Bankr. D. Ariz. 2001); Stein & Wheatly, *The Impact of Cure and Reinstatement on Default Interest*, 16 Am. Bankr. Inst. J. Jul./Aug. 1997, at 1. While that problem does not bear directly on the dispute in this case, it does tend to reinforce our conclusion that the text of subparagraph (2)(D) is ambiguous.

Representative Sensenbrenner, would strike the phrase "penalty rate or provision" in § 365(b)(2)(D) and replace it with "penalty rate or penalty provision." *See* H.R. 975, 108th Cong. § 328(a)(1)(B) (2003). But the same bill would also amend § 365(b)(1) to relax the cure requirement for certain nonmonetary defaults. *See id.* § 328(a)(1)(A). The most that can be gleaned from this unenacted legislation is that at least some members of Congress are aware that § 365(b)(2)(D) is a problem. It does not tell us how Congress in 1994 intended the present version of subparagraph (2)(D) to operate in cases like the one at bar.

(3) *Practical implications*

The best approach to interpreting § 365(b)(2)(D) focuses on practical considerations of bankruptcy policy and Congress's overarching purposes in the Bankruptcy Code. The *Claremont* decision has drawn sharp criticism from bankruptcy commentators, who nearly unanimously regard that case as an obstacle to the successful reorganization of many debtors in bankruptcy. *See, e.g.*, 3 Collier on Bankruptcy § 365.05[4] (15th ed. rev. 2003) (suggesting that *Claremont* reflects a "questionable" reading of subparagraph (2)(D) that is inconsistent with Congress's likely intent); Weintraub, *Historical Defaults and Cross-Defaults: Here a Default, There a Default, Everywhere a Default, Default, Default*, 26 Cal. Bankr. J. 286, 287 (2003) (*Claremont* imposes a "considerable roadblock" to the assumption and assignment of valuable contracts and "can have a potentially devastating effect" on the ability of certain debtors to reorganize); Stang, *Assumption of Contracts and Leases: The Obstacle of the Historical Default*, 24 Cal. Bankr. J. 39,

39 (1998) ("In restricting a debtor's ability to assume contracts and leases, the Claremont court undermined an important bankruptcy tool . . . in contravention of fundamental bankruptcy precepts."). The reasons for this criticism are evident. Many nonmonetary defaults are "historical facts" that are impossible to cure after the fact – for example, a debtor's failure to maintain leased property in a certain condition, to use leased equipment only for approved purposes, or to meet certain standards of quality or performance. [13] *See Vitanza,* 1998 WL 808629, at *24 n.51

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13. Of course, this depends on the definition of "cure," a term that is not defined in the Bankruptcy Code. Some courts and commentators have argued that some or even all non-monetary defaults are curable under the Code, whether or not they are "historical facts." *See, e.g., In re Walden Ridge Dev. Corp.*, 292 B.R. 58, 66-67 (Bankr. D.N.J. 2003); *In re Garcia*, 276 B.R. 627, 639-40 (Bankr. D. Ariz. 2002); Stang, *Assumption of Contracts and Leases: The Obstacle of the Historical Default*, 24 Cal. Bankr. J. 39 (1998). The prevailing view, however, is that many non-monetary defaults — especially those deemed "material" to the contract — cannot meaningfully be cured in bankruptcy. *See, e.g., Claremont*, 113 F.3d at 1034-35 (holding assumption barred because the debtors' default was an historical fact that could not be cured); *In re Beckett*, No. CIV.A. 00-5337, 2001 WL 767601, at *5-*6 (E.D. Pa. Jul. 5, 2001) (similar); *In re GP Express Airlines, Inc.*, 200 B.R. 222, 233 (Bankr. D. Neb. 1996) (airline's failure to maintain contractual performance obligations was an historical, non-monetary default and impossible to cure); *In re Lee West Enters.*, 179 B.R. 204, 208 (Bankr. C.D. Cal. 1995) (franchisee's closure for three months prior to bankruptcy petition was a non-monetary default that could not be cured); cf. 3 Collier on Bankruptcy § 365.05[4] (15th ed. rev. 2003) (referring to situations "where the trustee cannot go back in time to undo an act or omission of the debtor").

(most non-monetary defaults involve unalterable historical facts). Requiring a debtor to cure such incurable defaults is tantamount to barring the debtor from assuming any lease or contract in which such a default has occurred – no matter how essential that contract might be to the debtor's reorganization in bankruptcy. Indeed, that is exactly what happened in several cases following the *Claremont* rule. For example, in *In re Williams, supra*, the debtor was a professional truck driver who defaulted on his truck lease, which provided that he could only use his truck in the service of his employer. 299 B.R. at 684-85. The bankruptcy court ruled that the debtor's violation of that provision was an incurable historical default, then (citing *Claremont*) barred assumption of the lease under § 365, lifted the automatic stay, and allowed repossession of the debtor's truck. *See id.* at 686-87; *see also In re Beckett*, No. CIV.A. 00-5337, 2001 WL 767601, at *1, *5- *6 (E.D. Pa. Jul. 5, 2001) (permitting the debtor's eviction because the debtor could not cure her historical default on a lease provision requiring her to maintain her apartment in a "clean, orderly, and safe condition").

This cannot, in our view, be what Congress intended. To prevent a debtor from assuming a contract based on historical events that it cannot remedy undermines Congress's basic purpose in § 365: to promote "the successful rehabilitation of the business for the benefit of both the debtor and all its creditors."[14] *FBI Distrib.*, 330 F.3d at 45.

14. Eagle and Newark argue that § 365(b)(1) reflects a different policy goal: to ensure that the nondebtor party to an executory contract receives the benefit of its bargain if it is forced to continue (Cont'd)

This case well illustrates the force of that concern. Eagle and Newark together owe BankVest approximately $1 million in unpaid rent. Yet they argued to the bankruptcy court that BankVest's failure to complete delivery of the leased equipment is an "historical fact" not susceptible to cure. 270 B.R. at 541. So rather than simply seek an offset for any pecuniary harm they may have suffered, Eagle and Newark would deny the estate all $1 million in unpaid rent by compelling BankVest to cure what they allege is incurable.[15] That is plainly inconsistent with Congress's purpose in the Bankruptcy Code to maximize the value of the estate for all creditors. *Toibb* v. *Radloff*, 501 U.S. 157, 163 (1991); *In re Summit Corp.*, 891 F.2d 1, 5 (1st Cir. 1989);

(Cont'd)
performance after the debtor has filed for bankruptcy. See *In re Superior Toy & Mfg. Co.*, 78 F.3d 1169, 1174 (7th Cir. 1996). That policy concern is a legitimate one, but it does not control here. Bankruptcy by design involves the re-ordering of debtor-creditor relationships and the adjustment of bargains negotiated under more optimistic circumstances. Neither § 365(b)(1) nor any policy reflected therein alters the broader objective of the Bankruptcy Code to "give worthy debtors a fresh start." *In re Carp*, 340 F.3d 15, 25 (1st Cir. 2003); *cf. Bildisco*, 465 U.S. at 527 (bankruptcy courts "must focus on the ultimate goal of Chapter 11 when considering the[] equities" under § 365). Nor is the nondebtor party to a contract that is assumed notwithstanding a non-monetary default necessarily denied the benefit of its bargain, as it is free to sue the debtor for breach of contract after assumption.

15. We do not hold that BankVest's failure to deliver the last twenty items of leased equipment was in fact an incurable default, or even that it was a default at all. We merely accept that allegation for purposes of this appeal. The parties are free to litigate the facts of the appellants' allegations on remand (and after assumption).

see also United States v. *Shadduck*, 112 F.3d 523, 531 (1st Cir. 1997) (all creditors are injured by the efforts of a single creditor to keep property out of the estate).

All of this suggests that Congress meant § 365(b)(2)(D) to excuse debtors from the obligation to cure non-monetary defaults as a condition of assumption. The text, as we have said, readily bears that interpretation. It is not inconsistent with the meager legislative history. And developments in the bankruptcy courts prior to the 1994 amendments put Congress on notice of the problem of irremediable non-monetary defaults. *See, e.g.*, *In re Toyota of Yonkers, Inc.*, 135 B.R. 471, 477 (Bankr. S.D.N.Y. 1992) (failure to operate car dealership for seven consecutive days would constitute incurable historical default); *In re Deppe*, 110 B.R. 898, 904 (Bankr. D. Minn. 1990) (debtor's failure to maintain constant operations at gas station constituted incurable historical default); *In re Anne Cara Oil Co., Inc.*, 32 B.R. 643, 648 (Bankr. D. Mass. 1983) (gas station lessee's commingling of gasoline products was likely an incurable non-monetary default that would bar assumption).

This interpretation is also consistent with the remaining subparagraphs in § 365(b)(2), which are directed to so-called *ipso facto* clauses (for instance, contract provisions that force debtors into default merely for becoming insolvent or seeking bankruptcy protection). *See* § 365(b)(2)(A)-(C). Like defaults based on breaches of ipso facto clauses, non-monetary defaults are often a product of the debtor's very financial distress. In *Claremont* itself, for example, the non-monetary default that prevented the debtors from assuming their franchise agreement was their decision to close their

automobile dealership for the two weeks immediately prior to their bankruptcy petition. *Id.* So in the end, they were denied a valuable asset in their Chapter 11 reorganization because the same financial hardship that drove them into bankruptcy also forced them to default on their dealership agreement. This, we conclude, is among the *ipso facto* harms that Congress intended § 365(b)(2)(D) to prevent.[16] *Cf.* Weintraub, *supra*, at 292 n.20 (noting the similar interests served in § 365(b)(2)(D) by barring the enforcement of penalty rates and by preventing historical nonmonetary defaults from automatically precluding assumption).

Eagle and Newark assert that subparagraph (2)(D) cannot apply to all non-monetary defaults because that interpretation would render the *ipso facto* default provisions superfluous. *See Claremont*, 113 F.3d at 1034 (endorsing this argument). We disagree. The *ipso facto* defaults described in subparagraphs (A)-(C) are not *necessarily* non-monetary. For example, a breach of a provision relating to "the financial condition of the debtor" might well be monetary in nature, depending on the underlying contract. Subparagraph (2)(D) is not so "wholly superfluous" as to preclude what we

16. Non-monetary contractual obligations are similar to the *ipso facto* provisions in § 365(b)(2)(A)-(C) in another respect: the likelihood of default is under the control of the parties. This creates the risk that a potential creditor can effectively "bankruptcy-proof" its contract with a financially troubled company by making the deal contingent on the achievement of stringent performance or quality benchmarks. One recognized purpose of the *ipso facto* clauses in § 365(b)(2) is to prevent creditors from opting out of the bankruptcy process in this manner. *See generally* Collier on Bankruptcy, *supra*, at § 365.05[4].

consider to be its most sensible interpretation. *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992). There may be substantial overlap among the provisions of § 365(b)(2), but redundancy is not the same as surplusage. *See Germain*, 503 U.S. at 253 ("Redundancies across statutes are not unusual events in drafting, and so long as there is no positive repugnancy between two laws . . . a court must give effect to both." (internal citation and quotation marks omitted)).

C. Application of § 365(b)(2)(D)

We hold that under § 365(b)(2)(D), BankVest need not cure non-monetary defaults before assuming its equipment leases with Eagle and Newark. This clears the way for BankVest to assume the leases (subject to the approval of the bankruptcy court) and to file an action to collect the $1 million in outstanding rent. And in that action, Eagle and Newark may raise their defenses to payment and may counterclaim for damages for any losses actually suffered through BankVest's alleged breach. "[I]t seems that Congress's intent in enacting [§ 365(b)(2)(D)] was to address just such a situation, that is, where the trustee cannot go back in time to undo an act or omission of the debtor but could compensate for any actual pecuniary loss that the other contracting party suffered as a result of the default." Collier on Bankruptcy, *supra*, § 365.05[4] (criticizing *Claremont*). We emphasize, however, that the assumption proceeding itself is not the place to resolve those issues. *See In re Orion Pictures Corp.*, 4 F.3d 1095, 1098-99 (2d Cir. 1993) ("At heart, a motion to assume should be considered a summary proceeding, intended to efficiently review the trustee's or debtor's decision to adhere to or reject a particular

contract in the course of the swift administration of the bankruptcy estate. It is not the time or place for prolonged discovery or a lengthy trial with disputed issues."); *In re Docktor Pet Ctr., Inc.*, 144 B.R. 14, 16 (Bankr. D. Mass. 1992). As the BAP concluded, "[i]f a debtor wants to assume [a contract] in its business judgment, knowing that issues other than payment due may be litigated after assumption, the debtor should be allowed to do so." 290 B.R. at 448.

III.

The judgment of the Bankruptcy Appellate Panel is ***affirmed***.

APPENDIX B — OPINION OF THE UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT DATED MARCH 28, 2003

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP Nos. MW 01-089 and MW 01-090
(consolidated appeals)

BANKVEST CAPITAL CORP.,

Debtor

EAGLE INSURANCE COMPANY
and
NEWARL INSURANCE COMPANY,

Plaintiffs-Appellants

v.

BANKVEST CAPITAL CORP.,

Defendant-Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Joel B. Rosenthal, U.S. Bankruptcy Judge)

Before VAUGHN, BROWN and KORNREICH,
U.S. Bankruptcy Appellate Judges

March 28, 2003

Appendix B

VAUGHN, U.S. Bankruptcy Appellate Panel Judge.

Eagle Insurance Company ("Eagle") and Newark Insurance Company ("Newark") (collectively "Appellants") appeal from the Decision and Order ("Decision") of the United States Bankruptcy Court for the District of Massachusetts ("Bankruptcy Court") entered on December 12, 2001. *See In re BankVest Capital Corp.*. 270 B.R. 541 (Bankr. D. Mass. 2001). The Decision denied the Appellants' request for the payment of cure costs pursuant to § 365 of the United States Bankruptcy Code (the "Code") and BankVest Capital Corporation's ("Debtor's" or "Appellee's") confirmed plan of reorganization. [1] For the reasons set forth below, the Decision of the Bankruptcy Court is affirmed.

BACKGROUND

The Appellants entered into separate Master Equipment Lease Agreements (collectively, "Lease Agreements") with LeaseVest Capital Corp. ("LeaseVest") and the Debtor on May 27, 1999. Pursuant to the Lease Agreements, Eagle and Newark were to lease approximately 190 pieces of computer equipment from LeaseVest and the Debtor for monthly rental payments of $11,940.61 and $10,111.82, respectively. However, the Appellants only received some of the equipment, plus 20 pieces of "loaner equipment" from LeaseVest and the Debtor's vendor, Nortel.

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1. Unless otherwise noted, all statutory section references herein are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, *et seq*.

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The Debtor was placed into an involuntary bankruptcy on December 17, 1999, before the loaner equipment was replaced. The Debtor's reorganization plan indicated that all parties which required cure costs pursuant to § 365 file such requests before the effective date of the order confirming the plan.[2] The Appellants filed their claims for payment of cure costs on June 15, 2001, asserting that the Debtor's breach could not be cured. To the extent the breach could be cured, the Appellants sought damages.[3] App. at 111, 133. Finova

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2. Specifically, Paragraph 7.1 of the Plan and Confirmation Order provides:

> All equipment leases, in which the Debtor is lessor, which are part of the Owned Portfolio, the Warehouse Portfolio and such other leases as the holders of Allowed Secured Claims timely request be assumed and assigned, shall be deemed assumed upon the Effective Date unless specifically rejected on or before such date or a motion to reject regarding a particular lease is pending, or unless a claim is made on or before the Effective Date that assumption hereunder requires the Debtor pay Cure Costs to any party to an assumed contract or lease.

App. at 55.

3. Eagle alleged total damages of $330,542.64, while Newark calculated its damages at $314,372.64. Both Appellants alleged that damages included actual damages of $88,145 consisting of additional payroll expenses ($71,075); outsourced labor ($12,000); outsourced training ($2,000); and additional repair costs ($3,070). App. at 132, 152. In addition, both sought an unspecified reduction of the lease payments for the period during which they did not have the non-delivered items. App. at 111, 133.

Loan Administration, Inc. ("Finova") filed an objection to the claims on August 15,2001 on behalf of the Debtor.[4] App at 153-72.

The Bankruptcy Court held a non-evidentiary hearing[5] on November 7,2001 and entered its Decision on December 12,2001, sustaining Finova's objection to Appellants' claims and holding that to assume the pre-petition Lease Agreements, the Debtor had to cure only its monetary defaults, if any, and did not have to cure non-monetary defaults arising from the delivery of substituted equipment to the Appellants. App. 236-37. On December 21,2001, the Appellants filed their notices of appeal. App. at 238-41.

JURISDICTION

Pursuant to 28 U.S.C. §§ 158(a), the Panel may hear appeals "from final judgments, orders, and decrees." 28 U.S.C. § 158(a)(l). A final judgment "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229,233 (1945). The instant appeal arises from a final order of the Bankruptcy Court denying the Appellants' request for cure costs pursuant to § 365 of the Code.

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4. Finova and the Debtor entered into a stipulation, filed with the Bankruptcy Court on August 6, 2001, whereby Finova agreed to assume the Debtor's responsibility to defend the cure claims asserted by Eagle and Newark.

5. The Bankruptcy Court essentially treated the issues before it as a motion to dismiss, considering the Appellants' well pleaded allegations of fact to be true for purposes of its analysis of §365.

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STANDARD OF REVIEW

Generally, the Panel evaluates the Bankruptcy Court's findings of fact pursuant to the "clearly erroneous" standard of review and its conclusions of law *de novo. Grella v. Salem Five Cent Savings Bank*, 42 F.3d 26, 30 (1st Cir. 1994); *see also Palmacci* v. *Umpierrez.* 121 F.3d 781, 785 (1st Cir. 1997). Following a non-evidentiary hearing, the Bankruptcy Court rendered its Decision based upon its interpretation of § 365(b)(2)(D). Therefore, the only question presented on appeal is one of law and we review the Bankruptcy Court's conclusions *de novo. See Jeffrey v. Desmond.* 70 F.3d 183, 185 (1st Cir. 1995);. *In re SPM Mfg. Corp.*, 984 F.2d 1305,1311 (1st Cir. 1993); *In re Indian Motocycle Co.. Inc.*, 261 B.R. 800, 805 (B.A.P. 1st Cir. 2001).

DISCUSSION

The Bankruptcy Court held that:

> Common sense dictates that the failure to deliver certain items is a quintessential example of a nonmonetary default. The Debtor was not required to make any payments. Indeed the money was to flow from Eagle and Newark to the Debtor. Therefore there are no cure claims to be satisfied before assumption and assignment of the leases. At best there are only claims for whatever damages Eagle and Newark can demonstrate flowed from the delivery of loaner items in place of the scheduled items. These claims need to be addressed in the context of an evidentiary hearing

> at which the parties will have to introduce evidence as to the claims and defenses thereto[.]

270 B.R. at 544; App. at 236-37. Thus, the central issues presented in this appeal are whether the Bankruptcy Court erred in (1) interpreting § 365(b)(2)(D) as not requiring the Debtor to cure any non-monetary defaults as a condition to assuming the Lease Agreements executed by the Appellants, and (2) finding that any claims or defenses available to the Appellants based on the Debtor's alleged non-monetary default should be addressed in the context of an evidentiary hearing in a court of competent jurisdiction. The Panel finds that the Bankruptcy Court did not err in either of its determinations.

Section 365(b) provides in relevant part:

> (1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—
>
> > (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
> >
> > (B compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

> (C) provides adequate assurance of future performance under such contract or lease.
>
> (2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to —
>
> > (D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

11 U.S.C. § 365(b). Cure Costs are defined under the plan as "[t]hose payments and assurances required upon assumption of an executory contract or unexpired lease pursuant to 11 U.S.C. section 365(b)(l)." App. at 22.

Applying *In the Matter of GP Express Airlines. Inc.* and *In re Western Pacific Airlines, Inc.*, the Bankruptcy Court found that the plain language of § 365(b)(2)(D) supported the "interpretation that penalty rate obligation and a non-monetary default are two separate types of breaches which a debtor is not required to cure prior to assumption of a contract." *BankVest*, 270 B.R. at 543; App. at 236: *see also GP Express Airlines*, 200 B.R. 222, 233-34 (Bankr. D. Neb. 1996) (determining that § 365(b)(2)(D) addresses "two separate issues . . . . [A] debtor is not required to cure or satisfy any penalty rate obligation and the debtor is not required to cure any defaults in nonmonetary obligations.

The statutory term 'rate' refers to interest rate. . . . By definition, there is no interest accrual on a nonmonetary obligation."); *Western Pacific Airlines*, 219 B.R. 298, 304 (Bankr. D. Colo. 1998), *rev'd on other grounds,* 219 B.R. 305 (D. Colo. 1998).

The Appellants argue that the Bankruptcy Court misinterpreted § 365(b)(2)(D), alleging that a majority of courts read the section as excusing a Debtor from curing a penalty rate or provision relating to a non-monetary default, but not the non-monetary default itself. Accordingly, they urge the adoption of *Claremont Acquisition Corp. v. General Motors Corp. (In re Claremont Acquisition Corp.)* which holds that the word "penalty" modifies both "rate" and "provision" and. therefore, a debtor's failure to operate for seven consecutive days is not a non-monetary default that can be excused under § 365(b)(2)(D). 113 F.3d 1029 (9th Cir. 1997). The Bankruptcy Court had rejected the Ninth Circuit's interpretation of § 365(b)(2)(D), noting that both the bankruptcy and district courts in *Claremont* had interpreted § 365 as not requiring cure of debtor's past non-monetary default. 270 B.R. at 543; App. at 236.

The cases cited by the Appellants do not support their contention that a majority of courts support the *Claremont* reading of § 365. The Fourth Circuit decision cited, *Three Sisters Partners, LLC v. Harden (In re Shangra-La. Inc.)*, only addresses § 365(b)(2)(D) in dicta, noting that default rate interest penalty is not available for non-monetary default rates. *Shangra-La*, 167 F.3d 843, 848 n.3 (4th Cir. 1999). Similarly, the language cited from *In re Ernst Home Center. Inc.* by the Appellants is also dicta located in a

footnote. 209 B.R. 955, 963 n.6 (Bankr. W.D. Wash. 1997). In *Ernst*, no motion to assume had been filed. *See id.* at 958-60. The unreported decision of *In re Vitanza* is also not on point. *Vitanza*. No. 98-19611,1998 Bankr. LEXIS 1497 (Bankr. E.D. Pa. Nov. 13, 1998). In that case, the necessity of curing a non-monetary default was not a component of the court's holding, but the court addressed § 365(b)(2)(D) by noting that it "only relieves debtors of their obligation to pay penalties and not of their obligation to cure non-monetary defaults." *Id.* at *75 n.44. The court in *Vitanza* also stated, in dicta, that:

> Most non-monetary defaults (e.g., failure to maintain the premises in a certain condition, failure to seek approval; failure to provide reasonable consent) are "historical facts." Consequently, if [the lessor's] "historical fact" theory were applied to all non-monetary defaults, it would, in effect, eliminate the right to assume a lease for which non- monetary defaults exist. If Congress had intended to limit the right to assume to leases involving only monetary defaults, it could have so stated in § 365.

Id. at *87 n.51.

This Panel affirms the Bankruptcy Court's plain language interpretation of § 365(b)(2)(D). In practice, if debtors had to cure non-monetary defaults, many leases could not be assumed because the cure would be impossible to accomplish. By extension, the Panel adopts the *GP Express Airlines* interpretation of § 365(b)(2)(D). However, the Panel does

not adopt its holding that a separate trial needs to be held not only as to the non-monetary defaults under contracts, but also as to the issue of whether the debtor can give adequate assurance of future performance under executory contracts.

Based on the language of the Debtor's Plan and Confirmation Order that "[all equipment leases, in which the Debtor is lessor, . . . shall be deemed assumed upon the Effective Date unless specifically rejected on or before such date or a motion to reject regarding a particular lease is pending, or unless a claim is made on or before the Effective Date that assumption hereunder requires the Debtor to pay Cure Costs to any party to an assumed contract or lease[,]" the present case involves assumption only. App. at 55. In order to assume, a debtor does not have to cure non-monetary defaults. However, to assign under § 365(f)(2)(B), a debtor must show an adequate assurance of future performance. This additional requirement provides protection from non-monetary defaults when a third party is involved in the transaction. If there is just an assumption, the parties can still litigate their issues of breach as if there was no bankruptcy.

Under a motion to assume or reject an executory contract the only issue properly before a court is whether the assumption or rejection of the subject contract is based upon a debtor's business judgment. *See Orion Pictures Corp. v. Showtime Networks. Inc.*, 4 F.3d 1095, 1099 (2d Cir. 1993), *cert. dismissed.* 511 U.S. 1026 (1994); *In re Docktor Pet Center. Inc.*, 144 B.R. 14, 16 (Bankr D. Mass- 1992) In *Orion* the Second Circuit reversed both the-bankruptcy and district

courts and held that, in ruling on the debtor's motion to assume a contract, the bankruptcy court should not have resolved the disputed issue regarding the debtor's alleged breach of the agreement. The *Orion* court stated that:

> The bankruptcy court erred because it misapprehended the fundamental nature and purpose of a motion to assume. At heart, a motion to assume should be considered a summary proceeding, intended to efficiently review the trustee's or debtor's decision to adhere to or reject a particular contract in the course of the swift administration of the bankruptcy estate.

4 F.3d at 1098. Further, in *Docktor Pet Center*, the Bankruptcy Court for the District of Massachusetts held that "a motion to assume an executory contract is generally, and should be, a summary proceeding." 144 B.R. at 16. Accordingly, the Bankruptcy Court's determination that the "parties are free to pursue whatever claims, counterclaims, and defenses they have in a non-bankruptcy court of competent jurisdiction" is consistent with the holdings of *Orion* and *Docktor Pet Center*. 270 B.R. at 544; App. at 237.

In the instant appeal, there was no issue relative to the Debtor's business judgment regarding the assumption of the Lease Agreements. Although no factual findings were made, it is undisputed that the Appellants were not entitled to any contractual payment under the terms of the Lease Agreements. If a debtor wants to assume in its business judgment, knowing that issues other than payment due may be litigated after assumption, the debtor should be allowed to do so.

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CONCLUSION

For the reasons set forth above, the Panel finds the Bankruptcy Court .did not err in interpreting § 365(b)(2)(D) as not requiring the Debtor to cure any non-monetary defaults as a condition to assuming the Lease Agreements executed by the Appellants and finding that any claims or defenses available to the Appellants based on the Debtor's alleged non-monetary default should be addressed in the context of an evidentiary hearing in a court of competent jurisdiction. Accordingly, the Bankruptcy Court's Decision is AFFIRMED.

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS DATED DECEMBER 11, 2001

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

Chapter 11
Case No. 99-47760-JBR

In re:

BANKVEST CAPITAL CORPORATION,

DEBTOR

DECISION AND ORDER
ON REQUESTS FOR PAYMENT OF CURE COSTS
[#850 AND #851]

This matter having come before the Court for hearing on the Request of Newark Insurance Company for Payment of Cure Costs [#850], the Objection by Finova Loan Administration, Inc. to Statement of Cure of Newark Insurance Company[#947] the Request of Eagle Insurance Company for Payment of Cure Costs [#851], Inc., and the Objection by Finova Loan Administration, Inc. to Statement of Cure of Eagle Insurance Company [#948], and after consideration of the foregoing, the memoranda of law filed by the parties, and the arguments of counsel, the Court makes the following findings and conclusions.

Appendix C

The Cure Claims

Newark Insurance Company ("Newark") and Eagle Insurance Company ("Eagle", collectively with Newark, the "Claimants") filed separate but substantially similar requests for the payment of cure costs on June 15, 2001. The requests were timely as Eagle and Newark had sought and obtained clarification of the deadline for filing such claims. Newark and Eagle allege that the Debtor failed to deliver all of the leased equipment. Specifically they state that the Debtor did not deliver 20 of the 190 items it was to deliver to each Claimant. Instead "substitute loaner" items were delivered in place of those 20 items.

The Claimants allege that the breach is such that it cannot be cured. To the extent that it can be cured however, each claims damages as a result of the delivery of the loaner items and the failure to deliver the 20 items enumerated in Schedule A to the leases. Eagle alleges total damages of $330,542.64 while Newark calculates its damages at $314,372.64. Both Claimants allege that the damages include actual damages of $88,145 consisting of additional payroll charges ($71,075); outsourced labor ($12,000); outsourced training ($2,000); and additional repair costs($3,070). In addition both seek an unspecified reduction of the lease payments for the period during which they did not have the non-delivered items.

During the bankruptcy, Finova Loan Administration, Inc. ("Finova") was authorized to administer certain commercial leases including those at issue herein and it continues in that capacity. Pursuant to the Debtor's Fifth Amended Joint

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Liquidating Plan of Reorganization, as modified (the "Plan"), which was confirmed by the Court, the Debtor proposed to assume and assign certain leases, including the ones at issue, although it also reserved the right to defer a final decision to reject or assume and assign, in the event a cure claim was filed, until after adjudication of the cure claim. Finova filed objections to each cure claim asking that each claim be denied in its entirety.

Background

On or about May 27, 1999 Eagle and Newark entered into separate but substantially similar Master Equipment Lease Agreements (the "Lease Agreements") with LandVest Capital Corp. ("LandVest") and BankVest Capital Corp. (the "Debtor") whereby LandVest and the Debtor were to lease certain computer equipment to the Claimants. On or about June 29, 1999 LandVest and each of the Claimants entered into Lease Schedules that were incorporated into the master Lease Agreements. Pursuant to Lease Schedule No. 001 Eagle agreed to make 48 monthly payments of $11,940.61 per month for the rental of the equipment set forth in Schedule A to Lease Schedule No. 001. Pursuant to Lease Schedule No. 002 Newark agreed to make 48 monthly payments of $10,111.82 per month for the equipment set forth in the Schedule A attached to Lease Schedule No. 002. Both Lease Schedules No. 001 and No. 002 provided that "[t]he rental payments may change for Equipment accepted after Aug. 31, 1999." "Equipment" is defined in each of the Lease Schedules as the equipment set forth in the respective Schedules A.

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LandVest or the Debtor were to obtain the leased equipment from Nortel. At the time the parties entered into the Lease Agreements, they knew that Nortel would not complete production of approximately 20 of the leased items until several months after the commencement of the lease term. Therefore the parties agreed that Nortel would provide loaner equipment in place of the not yet manufactured items.

In or about August 1999 the items were delivered with the loaner equipment delivered in place of the not yet manufactured items. On August 25, 1999 both Eagle and Newark executed Certificates of Acceptance (the "Certificates") that were signed by Philbert Nezamodeen who was the Vice President and Chief Operating Officer of Eagle and the Vice President and Treasurer of Newark. In addition Mr. Nezamodeen was also the secretary of Material Damage Adjustment Corp. which shares the same address as Eagle and Newark and which guaranteed the obligations of Eagle and Newark under their respective leases. Eagle also guaranteed Newark's obligations while Newark guaranteed Eagle's. At the hearing, Eagle and Newark's counsel argued that the claimants were forced to deliver the Certificates before the Debtor would deliver the equipment and therefore argued that the Claimants should not be estopped from asserting the nondelivery of the 20 items which they characterize as a "substantial" portion of the leased equipment. The Court need not reach and decide the estoppel issue.

Appendix C

Is the debtor required to cure these defaults in order to assume the leases?

11 U.S.C.A. § 365(b) provides in relevant part:

(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee–

> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to–

> (D) the satisfaction of any penalty rate or provision relating to a default arising

> from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

Although none of the parties have raised the issue, Section 365(b)(2)(D) may govern this matter. There is disagreement among the courts that have interpreted this section as to whether the word "penalty" defines both the word "rate" and the phrase "provision relating to a default arising from any failure of the debtor to perform nonmonetary obligations." In other words, must the nonmonetary default arise from a penalty provision?

In *In the Matter of GP Express Airlines, Inc.*, 200 B.R. 222 (Bankr. D. Neb. 1997), the court read Section 365(b)(2)(D) "as addressing two separate issues. . . . [A] debtor is not required to cure or satisfy any penalty rate obligation and the debtor is not required to cure any defaults in nonmonetary obligations. The statutory term 'rate' refers to interest rate. . . . By definition, there is no interest accrual on a nonmonetary obligation." *Id.* at 233-34. The court did note, however, that excusing the debtor from curing pre-assumption nonmonetary defaults did not relieve it from the requirement under Section 365(b)(l)(C) of demonstrating that all obligations, including nonmonetary ones, could be met post-assumption. *Accord In re Western Pacific Airlines, Inc.*, 219 B.R. 298, 304 (Bankr. D. Colo. 1998). *But see Claremont Acquisition Corp.* v .*General Motors Corp. (In re Claremont Acquisition Corp.)*, 113 F.3d 1029 (9th Cir. 1997) (holding that the word "penalty" modifies both "rate" and "provision" and therefore debtor's failure to operate for

7 consecutive days is not a nonmonetary default that can be excused under section 365(b)(2)(D)), *aff'g on other grounds*, 186 B.R. 977 (C.D.Cal. 1995) (both district court and bankruptcy court interpreted Section 365(b)(2)(D) as not requiring cure of debtor's past nonmonetary default arising from failure to operate).

The plain language of Section 365(b)(2)(D) supports the *GP Express Airlines* interpretation that penalty rate obligation and a nonmonetary default are two separate types of breaches which a debtor is not required to cure prior to assumption of a contract. Therefore whether BankVest could even cure the past defaults is irrelevant if the failure to deliver the 20 items is a nonmonetary default because a cure is not required.

Common sense dictates that the failure to deliver certain items is a quintessential example of a nonmonetary default. The Debtor was not required to make any payments. Indeed the money was to flow from Eagle and Newark to the Debtor. Therefore there are no cure claims to be satisfied before assumption and assignment of the leases. At best there are only claims for whatever damages Eagle and Newark can demonstrate flowed from the delivery of loaner items in place of the scheduled items. These claims need to be addressed in the context of an evidentiary hearing at which the parties will have to introduce evidence as to the claims and defenses thereto, including the circumstances surrounding the delivery of the Certificates of Acceptance.

Appendix C

Conclusion

For the foregoing reasons, the objections to the requests for cure claims [#948] are sustained and the requests for cure claims [#850 and #851] are denied. The parties are free to pursue whatever claims, counterclaims, and defenses they have in a non-bankruptcy court of competent jurisdiction.

Dated: December 11, 2001

s/_____
Joel B. Rosenthal,
United States Bankruptcy Judge

APPENDIX D — RELEVANT PORTIONS OF THE CLAREMONT DECISION IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 12, 1997

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95-56527, No. 95-56589

May 12, 1997, Filed

In re: CLAREMONT ACQUISITION CORPORATION, INC.; WORTHINGTON; CAL WORTHINGTON DODGE, INC.;

MERHIGE, Senior District Judge:

Appellants Cal Worthington & Cal Worthington Dodge, Inc. ("Worthington") and Debtors, a group of commonly owned automobile dealerships in the Claremont Auto Center ("Debtors"), appeal an order of the district court which reversed an order of the bankruptcy court compelling Appellee General Motors Corporation ("GM") to accept assignment of Debtors' franchise agreements to Worthington. GM has filed a cross-appeal regarding an issue upon which it was unsuccessful in the courts below. For the reasons which follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Debtors operated Cadillac, Pontiac/GMC Truck, Ford, Isuzu and Hyundai dealerships at the Claremont Auto Center in Claremont, California. On or about November 7, 1994,

Debtors ceased operating their automobile dealerships. On November 20, 1994, Debtors commenced a Chapter 11 bankruptcy proceeding. On March 31, 1995, the bankruptcy court approved Worthington as the purchaser of the Debtors' assets, including the dealer franchises. Applying California Vehicle Code § 11713.3(e), which prohibits transfer of an automobile franchise agreement without the consent of the manufacturer whose consent may not be unreasonably withheld, the bankruptcy court required the consent of GM prior to ordering the assignment of the franchise agreements to Worthington. GM refused to consent to the assignment, prompting Debtors to seek an order compelling the assignment. After hearing argument, the bankruptcy court entered an order finding that GM had unreasonably withheld consent within the meaning of Cal. Veh. Code § 11713.3(e). The bankruptcy court therefore ordered GM to accept the assignment of Debtors' GM Dealer and Service Agreements (the "GM Dealer Agreements") from the Debtors to Worthington. The bankruptcy court also ruled that pursuant to § 365(b)(2)(D) of the Bankruptcy Code (the "Code"), Debtors were not required to cure any nonmonetary defaults in order to assume and assign their contracts to Worthington.

GM appealed the order compelling assignment of the GM Dealer Agreements. The district court found that the bankruptcy court had misapplied Cal. Veh. Code § 11713.3(e) and reversed the bankruptcy court's order as it applied to *GM. In re Claremont Acquisition Corp.*, 186 B.R. 977, 986-87. (C.D. Cal. 1995). The district court affirmed, however, the bankruptcy court's interpretation of § 365(b)(2)(D). Id. at 989-90. Worthington and Debtors now appeal the district court's decision with respect to the

application of § 11713.3(e) to the assignment. GM has filed a cross-appeal challenging the district court's interpretation of § 365(b)(2)(D).

II

STANDARD OF REVIEW

This court reviews the district court's decision on an appeal from a bankruptcy court *de novo*. *Daily v. Federal Deposit Insurance Corp. (In re Daily)*, 47 F.3d 365, 367 (9th Cir. 1995); *Siragusa v. Siragusa (In re Siragusa)*, 27 F.3d 406, 407 (9th Cir. 1994) (per curiam). The court independently reviews the bankruptcy court's decision and need not give deference to the district court's determinations. *Robertson v. Peters (In re Weisman)*, 5 F.3d 417, 419 (9th Cir. 1993). We review the bankruptcy court's interpretation of applicable law *de novo*, and the findings of fact for clear error. *500 West INA Road Trust v. Tucker (In re Tucker)*, 989 F.2d 328, 330 (9th Cir. 1993).

III

DISCUSSION

A. Assignment of the GM Dealer Agreements

California law restricts an automobile franchisee's ability to assign the franchise without the consent of the manufacturer. Section 11713.3 of the California Vehicle Code provides:

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> It is unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to do any of the following:
>
> . . .
>
> (e) To prevent, or attempt to prevent, a dealer from receiving fair and reasonable compensation for the value of the franchised business. There shall be no transfer or assignment of the dealer's franchise without the consent of the manufacturer or distributor, which consent shall not be unreasonably withheld.

Cal. Veh. Code § 11713.3.

The bankruptcy court held that § 11713.3(e) applied to the assignment of the GM Dealer Agreements to Worthington.[1] On appeal, Worthington argues that the bankruptcy court erred in applying this statute because § 365(f)(1) of the Code does not permit courts to look to state laws prohibiting the assignment of executory contracts. 11 U.S.C. § 365(f)(1). Worthington argues that the bankruptcy court should not have inquired whether GM's refusal to consent was "reasonable" under California law, but should

1. Although it is technically more accurate to speak of the assignment of a party's rights under a contract and the delegation of a party's duties, this opinion follows the more common use of the term "assign" as encompassing both the assignment of rights and the delegation of duties. *See Everex Systems, Inc. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 676 n.2 (9th Cir. 1996).

have instead inquired whether Worthington had given GM "adequate assurance of future performance" as required by § 365(f)(2)(B). 11 U.S.C. § 365(f)(2)(B).[2] Federal courts have struggled with interpreting the Bankruptcy Code provisions governing the assignment of executory contracts. Section 365(f)(1) of the Code provides a general rule which permits a trustee in bankruptcy to assign an executory contract:

> Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection [requiring adequate assurance of future performance].

---

2. Section 365(f)(2) provides:

> The trustee may assign an executory contract or unexpired lease of the debtor only if –
>
> (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
>
> (B) adequate assurance of future performance by the assignee of such contract is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2).

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11 U.S.C. § 365(f)(1). Subsection (c) of § 365 contains an important exception to this assignability rule:

> The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if –
>
> (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties.

11 U.S.C. § 365(c)(1)(A).

Section 365(f)(1) appears to *authorize* a trustee to assign an executory contract, notwithstanding any contrary provision in the contract or in applicable law, provided that adequate assurance of future performance by the assignee is provided. Section 365(f)(1), explicitly states, however, that it applies except as provided in subsection (c) of § 365. Subsection (c), in turn, *prohibits* an assignment of an executory contract if applicable law excuses the non-debtor party from accepting performance from the assignee. What § 365(f)(1) appears to give, § 365(c)(1)(A) seems to take away.

Recently, in *In re CFLC*, 89 F.3d 673 (9th Cir. 1996), this court recognized the apparent conflict between

subsections (f) and (c), and noted that this conflict has lead to two different constructions of § 365 and the meaning of the phrase "applicable law" in both subsections. *Id.* at 676-77 (comparing *In re Pioneer Ford Sales*, 729 F.2d 27, 29 (1st Cir. 1984), with *Rieser v. Dayton Country Club Co. (In re Magness)*, 972 F.2d 689, 695 (6th Cir. 1992)). The *CFLC* court did not find it necessary to resolve this conflict, however, because assignment of the patent at issue in that case was barred under either construction of the statute. Likewise, in the instant case, we find it unnecessary to address this matter because resolution of the conflict will not result in the assignment of the GM Dealer Agreements. Instead, we find that the issue raised by GM's cross-appeal, regarding the proper interpretation of § 365(b)(2)(D), is dispositive of this appeal.

IV

GENERAL MOTORS' CROSS-APPEAL

A. Background

On or about November 7, 1994, Debtors ceased operating their automobile dealerships. The bankruptcy cases were not filed until November 20, 1994. The GM Dealer Agreements provided that GM may terminate the franchise for the failure to operate the business for seven consecutive business days. [3]

---

3. Article 14.5 of the GM Dealer Agreement provided:

> If [GM] learns that any of the following has occurred, it may terminate this Agreement by giving Dealer written notice of termination. Termination will be effective on the date specified in the notice.

(Cont'd)

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Debtors' failure to operate the dealership for two weeks preceding the bankruptcy filing constituted a nonmonetary default. Moreover, this default is a "historical fact" and, by definition, cannot be cured. *See Lee West Enterprises*, 179 B.R. 204, 208 (Bankr. C.D. Cal. 1995).

In general, a debtor must cure all defaults, both monetary and nonmonetary, prior to the assumption and assignment of an executory contract. 11 U.S.C. § 365(b)(1). However, § 365(b)(2) sets forth an exclusive list of the monetary and nonmonetary breaches that a debtor need not cure before assuming and assigning a contract. 11 U.S.C. § 365(b)(2)(A)-(D). Worthington argued below that, pursuant to subsection (D) of § 365(b)(2), its default does not preclude assignment of the GM Dealer Agreements. The bankruptcy court agreed with Worthington and held that § 365(b)(2)(D) relieved Debtors of their obligation to cure their default. In its cross-appeal, GM contends that subsection (D) does not apply to this case, and that Debtors' incurable nonmonetary default – the failure to operate the dealerships – precludes assignment of the GM Dealer Agreements.

(Cont'd)

. . .

> 14.5.3 – Failure of Dealer to conduct customary sales and service operations during customary business hours for seven consecutive business days.

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B. Construction of § 365(b)(2)(D)

Section 365(b)(2) of the Code provides:

> Paragraph (1) of this subsection [imposing the requirement of curing defaults prior to assumption and assignment] does not apply to a default that is a breach of a provision relating to –
>
> . . .
>
> (D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

11 U.S.C. § 365(b)(2)(D). Both GM and Worthington argue that the language of subsection (D) is unambiguous, but are at opposite poles as to its meaning. Worthington asserts that under subsection (D), it is not required to cure nonmonetary defaults. GM, on the other hand, reads subsection (D) as stating that, in curing defaults concerning nonmonetary obligations, the Debtor does not have to cure any penalties arising from a nonmonetary default.

The bankruptcy court adopted Worthington's construction of subsection (D). Accordingly, the court held that Worthington's failure to operate the dealerships was a breach of a "provision relating to a default arising from [a] failure of the debtor to perform [a] nonmonetary obligation," which, according to subsection (D), was a default that did

not have to be cured before assumption and assignment. We review the bankruptcy court's construction of the statute *de novo*. *Tucker*, 989 F.2d at 330.

The difference between the parties' interpretations of § 365(b)(2)(D) centers on the effect of the word "or" in subsection (D). Worthington argues that the word "or" operates to create two distinct and independent exceptions to the cure requirements of paragraph (1). Worthington apparently reasons that the clause preceding the word "or" excepts "satisfaction of any *penalty* rate" from the cure requirements, and that the clause following "or" is a catch-all provision excepting from cure *any* "nonmonetary obligations."

GM disagrees with this interpretation of the statute. GM argues that the word "penalty" in subsection (D) modifies *both* "rate" and "provision." Because the provision of the GM Dealer Agreement at issue in this case is not a penalty provision, *i.e.*, a liquidated damage provision, GM contends that the subsection (D) exception does not apply and the GM Dealer Agreements may not be assigned.

We find the construction offered by GM to be the more reasonable interpretation of the statute. A proper reading of subsection (D) requires that the adjective "penalty" modify *both* the words "rate" and "provision," not just the word "rate." Furthermore, like the word "penalty," the word "satisfaction" must also define both "rate" and "provision." Stated differently, subsection (D) provides an exception from cure for satisfaction of "penalty rates" and "penalty provisions." When construed in this manner, the clause

following the word "or" is not a catch-all exception to paragraph (1), but instead an exception concerning those provisions of a contract which impose a penalty for a debtor's failure to perform a nonmonetary obligation.

The proper construction of § 365(b)(2)(D) is readily apparent upon consideration of how the statute would read if the word "or" connected two distinct exceptions, as Worthington suggests. If this were the case, one should be able to delete the first clause, and the statute would still make sense. The statute would read as follows:

> Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to – (D) . . . provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

This construction of the section is both grammatically incorrect and nonsensical. The more logical construction of subsection (D) would have the words "satisfaction" and "penalty" relate to both "rate" and "provision." Under this construction, the statute reads as follows:

> Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to - (D) the satisfaction of any penalty rate or [*the satisfaction of any penalty*] provision relating to a default arising from any failure of the Debtor to perform nonmonetary obligations under an executory contract of unexpired lease.

Unlike Worthington's construction, this construction is grammatically correct.

GM's interpretation of § 365(b)(2)(D) is further supported by consideration of the general structure of § 365 which suggests that Congress intended subsection (D) to address a single issue: the payment of penalties. In each instance that Congress added a separate or independent exception to § 365(b)(1), it created a separate subclause in § 365(b)(2). The bankruptcy court's interpretation, however, requires a deviation from that general construction principle, as it results in a single subclause containing two completely different and unrelated exceptions. Furthermore, if subsection (D) is a catch-all provision, as Worthington contends, then subsections (A) through (C) of § 365(b)(2) would be superfluous, as they would be encompassed by subsection (D). Conversely, applying the terms "satisfaction" and "penalty" to both clauses in subsection (D) unifies the single provision. The first clause addresses penalty rates which are commonly imposed where a debtor's breach was monetary in nature. The second clause addresses the payment of penalties under liquidated damage provisions where the debtor's breach was nonmonetary in nature.

Finally, the limited legislative history of § 365(b)(2)(D) supports GM's construction of the section and suggests that Congress intended only to relieve debtors of the obligation to pay penalties. The House Report to the Bankruptcy Reform Act provides:

> Section 365(b) is clarified to provide that when sought by a debtor, a lease can be cured at a

> nondefault rate (i.e., it would not need to pay penalty rates).

5 *U.S. Congressional & Administrative News* at 3357 (1994) (H.R. No. 103-835 (1994))(parenthetical in original). By only referring to the payment of penalties, this legislative history lends weight to GM's construction of subsection (D).

Under the interpretation we adopt today, the § 365(b)(2)(D) exception does not apply to Debtors' default. Debtors' failure to operate the franchises for seven consecutive days is not a default of a contractual provision relating to the satisfaction of a penalty rate or the payment of a penalty. Accordingly, Debtors' obligation to cure their default is not excused. Because Debtors are unable to now cure their default, the GM Dealer Agreements may not be assumed and assigned.

V

CONCLUSION

We find that the bankruptcy court erred in its interpretation of § 365(b)(2)(D), and that this section does not relieve Debtors of their obligation to cure their default. Because this default cannot now be cured, the GM Dealer Agreements cannot be assumed and assigned under 11 U.S.C. § 365(b). The decision of the district court is therefore affirmed.

APPENDIX E — STATUTE AT ISSUE

§ 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> (B) the commencement of a case under this title;
>
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or
>
> (D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

> (A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the

financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before

assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

11 U.S.C. § 365.

(2)

Filed

No. 03-1442

IN THE

Supreme Court of the United States

EAGLE INSURANCE COMPANY and
NEWARK INSURANCE COMPANY,

Petitioners,

v.

BANKVEST CAPITAL CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

FREDERIC D. GRANT, JR.
727 Atlantic Avenue
Second Floor
Boston, MA 02111
(857) 204-3210

JAY L. GOTTLIEB*
SUSAN G. ROSENTHAL
ARIANNA FRANKL
SHERYL ALTWERGER
BROWN RAYSMAN MILLSTEIN
FELDER & STEINER LLP
900 Third Avenue
New York, NY 10022
(212) 895-2000

* *Counsel of Record*

Counsel for Respondent

187416

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QUESTIONS PRESENTED[1]

1. Whether 11 U.S.C. § 365(b)(2)(D) requires Bankvest Capital Corporation ("Bankvest" or "Respondent" or "Debtor") to cure nonmonetary defaults as a condition to assuming lease contracts executed by Eagle Insurance Company and Newark Insurance Company ("Petitioners"), where the alleged defaults are based on the delivery of non-conforming equipment, the Debtor has no obligations to make payments under the leases, and the only payment obligations are those of Petitioners?

2. Whether any claims or defenses available to Petitioners based on the Debtor's alleged default by delivery of nonconforming equipment should be addressed in an evidentiary hearing in a court of competent jurisdiction?

---

1. While the Debtor believes that certiorari is not merited in this case, pursuant to Supreme Court Rule 15, because the Debtor believes that the Petition mischaracterizes the questions presented, the Debtor submits a formulation of the first issue that more accurately describes the issues raised in this Court, and includes an alternative holding of the courts below as the second issue.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Respondent, by and through its undersigned attorneys, hereby discloses that:

Respondent Bankvest Capital Corporation is a nongovernmental corporate party, has no parent corporation and no publicly held company owns 10% or more of its stock.

Bankvest's representative U.S. Bank Portfolio Services is a division of Lyon Financial Services, Inc., which is entirely owned by U.S. Bancorp Equipment Finance, Inc. U.S. Bank Portfolio Services is the successor to Finova Loan Administration, Inc.

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INTRODUCTION

The essence of these proceedings is Petitioners' continued efforts to delay two collection actions commenced by a lessor, which happens to be a chapter 11 debtor, against two lessees of computer equipment which owe the Debtor in excess of $1,000,000. Petitioners seek to use Bankruptcy Code § 365(b)(2)(D) as a sword, against the Debtor, to defeat the Debtor's state law right to bring these actions. Moreover, Petitioners seek to have this Court facilitate their evasion of contractual obligations by taking up a correctly decided case and determining an issue that is not necessary to the resolution of the parties' ultimate disputes. Petitioners' generalizations and exaggerated statements about the purported impact of this case, and putative expressions of concern for the consistency of law are completely detached from any explanation of how *in this case* Petitioners are being harmed.

In fact, in the present case, *it is Petitioners that owe funds to the Debtor*. At most, Petitioners have alleged defenses to payment. Petitioners have, for years, avoided making payments for their use of the equipment leased to them by the Debtor. As opposed to every other case discussing § 365(b)(2)(D), in the present case there is an actual dispute as to whether a default even occurred. For all intents and purposes, the issues raised by Petitioners regarding nonmonetary defaults are academic or moot: Petitioners are now litigating the merits of their respective claims and defenses on the contracts at issue in the state court litigation instituted by the Debtor in October 2003 to collect unpaid lease charges from Petitioners.

While Petitioners suggest throughout their Petition that the decision of the First Circuit below has adversely affected the balancing between debtor and creditor interests in bankruptcy, all Petitioners really seek is to be absolved of any of their responsibility under the leases with the Debtor. It would be a strange 'balancing' indeed if Petitioners were able to escape their obligations to compensate the Debtor solely based upon the Debtor's bankruptcy filing. If anything, entities in bankruptcy are to be afforded the benefit of at least equal protections in bankruptcy as they would have outside – not to be placed in a worse position *vis-à-vis* third parties.

As set forth below, in view of the absence of any true conflict among the Courts of Appeals, and in view of the judicial restraint principles implicated by the Petition and the equities of the case, certiorari is neither warranted nor appropriate.

STATEMENT OF THE CASE

I. Statement Of Facts

On or about May 27, 1999, Petitioners each signed separate Master Lease Agreements (collectively, the "Leases") and other related contracts with the Debtor. App. 115-31; 137-51.[2] Under the Leases, Petitioners respectively leased approximately 190 pieces of computer equipment (the "Equipment") for a forty-eight month term. App. 115-22; 137-46. Petitioners agreed to pay monthly rent in the amounts of $11,940.61 (for Eagle Insurance Company) and $10,111.82 (for Newark Insurance Company). App. 121; 143.

---

2. References designated herein as "App." are to the record which was before the First Circuit Court of Appeals. As was noted in the proceedings below, App. 178 n.2, certain of the contract documents supplied by Petitioners bear handwritten notations which were manifestly added long after the document was signed.

Two years later, and well into the Debtor's bankruptcy proceedings, Petitioners claimed for the first time that they were excused from payment because, although they received the Equipment in July and August 1999, twenty items per lease were substitute equipment provided for use pending production of other items. App. 112; 134. Petitioners assert that "an arrangement was made with [vendor] Nortel for the delivery of 20 items of loaner equipment, which Nortel delivered in August." Petitioners' Moving Brief to the First Circuit Court of Appeals, dated August 25, 2003 ("Pet'r First Cir. Br.") at 4; App. 184. Petitioners allege that the Debtor knew of this outside arrangement but do not allege that the Debtor was a party to it.[3] The substitute items are alleged to represent much of the value of the Equipment. No allegation has been made that the Equipment, including all of the allegedly substituted items, did not operate in accordance with Petitioners' business requirements.

After receiving the Equipment, Petitioners signed Acceptance Certificates dated August 25, 1999, which indicate a Lease Term Commencement Date of August 17, 1999 (collectively, the "Certificates"). App. 128; 147.[4]

3. Petitioners have asserted, without specifying a date, that "[t]he Debtor was made aware that [Petitioners] did not receive all of the equipment." App. 112; 134. *See also* App. 184.

4. Acceptance was an important event, triggering payment to the vendor by the Debtor, and Petitioners' obligations to the Debtor under the Leases. It is the Debtor's position that upon acceptance, Petitioners' commitments under the Leases became irrevocable and independent. *See* MASS. GEN. LAWS ANN. ch. 106, § 2A-407; JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 10 (4th ed. 1995) ("The lessee under the statute must pay the finance lessor – come hell or high water."). *See also Nat'l Westminster Bancorp v. ICS Cybernetics, Inc.* (*In re ICS Cybernetics, Inc.*), 123 B.R. 467, 477 (Bankr. N.D.N.Y. 1989), *aff'd*, 123 B.R. 480 (N.D.N.Y. 1990) ("So-called 'hell or high water' clauses have been routinely accorded full force and effect by courts even in the face of defaults by the party seeking to enforce them.").

The language of the Certificates confirms that the Equipment operated as required. In paragraph 1, Petitioners acknowledged that "the Equipment set forth on Schedule A hereto (the "Equipment") is hereby unconditionally accepted by the Lessee for all purposes under the Lease and hereby agree[d] to faithfully perform all of it's [sic] obligations under the Lease with respect to the Equipment as of the date hereof." App. 128; 147. In paragraph 2, Petitioners represented and warranted that "the Equipment has been delivered and is in an operating condition and performing the operation for which it is intended to the satisfaction of the Lessee." App. 128; 147. Each of the Leases states:

> If the Equipment is not delivered, is not properly installed, does not operate as warranted, becomes obsolete, or is unsatisfactory for any reason whatsoever, Lessee shall make all claims on account thereof solely against the manufacturer or supplier and not against Lessor, and Lessee shall nevertheless pay all rentals and other sums payable hereunder.

App. 115; 137.

Petitioners used all Equipment received before the Lease Term Commencement Date, including the allegedly non-conforming substitute equipment, without complaint and without payment for more than two years. As the Bankruptcy Court brought out at the Hearing:

> **THE COURT:** Let me ask you: One of the troubling things in this whole situation is, where has your client been through this whole situation? This lease was entered into when? In 19 – May of '99. And you were supposed to get the goods in, was it the late summer or early fall of '99?

PETITIONERS' COUNSEL: No, no. The – there were – in August of 1999 I believe –

THE COURT: The commencement date was August 20th, '99.

PETITIONERS' COUNSEL: Yeah, and I think it was December or January – December '99 or January 2000 is when the other items were supposed to be delivered. In the meantime the manufacturer delivered to us certain loaner equipment. I don't know that it's terribly relevant here, but the goods weren't even being bought, in any case, from the manufacturer. They were being bought from a dealer who bought from the manufacturer.

THE COURT: But that – let's not obfuscate the question.

PETITIONERS' COUNSEL: I –

THE COURT: I asked you where was your client during this whole proceeding? I mean, we didn't hear from you – you weren't making payments. You didn't do anything until confirmation time; actually after confirmation.

PETITIONERS' COUNSEL: Oh, well –

THE COURT: What was your client doing during this period of time?

PETITIONERS' COUNSEL: We didn't do anything in –

THE COURT: Other than using the equipment?

App. 216-18.

II. Proceedings Below

The proceedings in this matter originated with the requests (the "Requests") of Petitioners for payment of cure costs pursuant to 11 U.S.C. § 365, filed with the Bankruptcy Court for the District of Massachusetts (the "Bankruptcy Court") on June 15, 2001. App. 111-32; 133-52. The Fifth Amended Joint Liquidating Plan of Reorganization, as Modified (the "Plan"), required all parties to executory contracts and unexpired leases with the Debtor to file requests for payment of cure costs on or before the Plan's effective date. App. 55.[5]

On August 15, 2001, Finova Loan Administration, Inc. ("Finova"), on behalf of the Debtor,[6] objected to the Requests.

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5. The Leases would have been assumed on June 11, 2001 – the effective date of the Plan – absent the filing of the Requests. App. 11-12; 245. The confirmation order in the Debtor's case, issued on May 31, 2001, provides that

> [i]n the event a claim for the Cure Costs is made, the time for the Debtor to assume or reject any such contract or lease shall be extended until such time as the Bankruptcy Court enters a Final Order determining the Claimant's entitlement to Cure Costs and the amount of such Cure Costs.

App. 12. The Plan defines Final Order as an "order of the Bankruptcy Court or other court having jurisdiction over any matter, from which no appeal can be taken or with respect to which the time period for taking an appeal has lapsed or terminated, or as to which all appeals have been withdrawn or dismissed with prejudice." App. 23. The Plan defines Cure Costs as "[t]hose payments and assurances required upon assumption of an executory contract or unexpired lease pursuant to 11 U.S.C. § 365(b)(1)." App. 22.

6. The Debtor and Finova entered into a stipulation, filed with the Bankruptcy Court on August 6, 2001, in which Finova agreed to defend the cure claims asserted by Petitioners. App. 107-09.

App. 153-72. The Bankruptcy Court then issued an order requiring Petitioners and the Debtor to submit memoranda of law on the issue of whether Petitioners' claims were "cure claim[s] or something else." App. 248-49. After receiving memoranda of law, the Bankruptcy Court held a non-evidentiary hearing on November 7, 2001 (the "Hearing"). App. 197-231. Throughout the briefing and decisions of the lower courts, the case has been treated akin to a motion to dismiss, whereby Petitioners' allegations were taken as true for purposes of the decision on the assumption only;[7] however, as discussed below, there are many factual issues in the case, including, significantly, whether there was even a default by the Debtor at all on the Leases with Petitioners.

On December 12, 2001, the Bankruptcy Court entered a decision and order (the "Bankruptcy Court Order") which concluded that Petitioners had no cure claims that needed to be satisfied prior to the Debtor's assumption of the Leases, but provided that any defenses or counterclaims raised by Petitioners could be pursued in a non-bankruptcy court of competent jurisdiction. *In re Bankvest Capital Corp.*, 270 B.R. 541, 544 (Bankr. D. Mass. 2001) (*Bankvest I*); App. 236-37. On December 21, 2001, Petitioners filed notices of appeal of the Bankruptcy Court Order to the Bankruptcy Appellate Panel for the First Circuit (the "Appellate Panel"). App. 238-41.

On March 28, 2003, the Appellate Panel affirmed the Bankruptcy Court Order, finding no error in

> (1) interpreting § 365(b)(2)(D) as not requiring the Debtor to cure any non-monetary defaults as

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7. *In re Bankvest Capital Corp.*, 360 F.3d 291, 293 & n.1 (1st Cir. 2004) (*Bankvest III*); App. 236-37; *In re Bankvest Capital Corp.*, 290 B.R. 443, 445 n.5 (B.A.P. 1st Cir. 2003) (*Bankvest II*); App. 258, 263; *In re Bankvest Capital Corp.*, 270 B.R. 541, 543-44 (Bankr. D. Mass. 2001) (*Bankvest I*).

> a condition to assuming the [Leases], and (2) finding that any claims or defenses available to [Petitioners] based on the Debtor's alleged non-monetary default should be addressed in the context of an evidentiary hearing in a court of competent jurisdiction.

In re Bankvest Capital Corp., 290 B.R. 443, 445 (B.A.P. 1st Cir. 2003) (*Bankvest II*); App. 260.

Before proceeding to its analysis, the Appellate Panel quoted from the Bankruptcy Court's decision:

> Common sense dictates that the failure to deliver certain items is a quintessential example of a nonmonetary default. ***The Debtor was not required to make any payments. Indeed the money was to flow from Eagle and Newark to the Debtor.*** Therefore there are no cure claims to be satisfied before assumption and assignment of the leases. ***At best there are only claims for whatever damages Eagle and Newark can demonstrate flowed from the delivery of loaner items in place of the scheduled items. These claims need to be addressed in the context of an evidentiary hearing at which the parties will have to introduce evidence as to the claims and defenses thereto***[.]

Bankvest II, 290 B.R. at 445 (quoting *Bankvest I*, 270 B.R. at 544); App. 259-60 (emphasis supplied).

On the issue of whether § 365(b)(2)(D) required cure of nonmonetary defaults as a condition to the Debtor's assumption of the Leases, the Appellate Panel affirmed the Bankruptcy Court's "plain language" reading of the provision that "'penalty rate obligation and a nonmonetary default are two separate types of breaches which a debtor is not required

to cure prior to assumption.'" *Bankvest II*, 290 B.R. at 446 (quoting *Bankvest I*, 270 B.R. at 543); App. 261.[8] The Appellate Panel found the Bankruptcy Court's determination that the "'parties are free to pursue whatever claims, counterclaims, and defenses they have in a non-bankruptcy court of competent jurisdiction'" consistent with case law holding that assumption is a summary proceeding. *Bankvest II*, 290 B.R. at 448 (quoting *Bankvest I*, 270 B.R. at 544); App. 264. "[T]he only issue properly before a court [on lease assumption] is whether the assumption or rejection of the subject contract is based upon a debtor's business judgment . . . In the instant appeal, there was no issue relative to the Debtor's business judgment regarding the assumption of the Lease Agreements." *Bankvest II*, 290 B.R. at 448; App. 263-64. Noting that it was undisputed that no payments were due to Petitioners under the Leases, the Appellate Panel stated, "[i]f a debtor wants to assume in its business judgment, knowing that issues other than payment due may be litigated after assumption, the debtor should be allowed to do so." *Bankvest II*, 290 B.R. at 448; App. 264.

Petitioners then appealed to the First Circuit Court of Appeals on April 16, 2003. App. 266-67. The First Circuit affirmed the ruling of the Appellate Panel on March 15, 2004,

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8. The Debtor had not raised § 365(b)(2)(D) as a basis for denying Petitioners' Requests. This was because it was, and is, the Debtor that was asserting substantial claims against the Petitioners, and the Debtor never sought to bar Petitioners' assertion of defenses but rather agreed to have the alleged defenses to payment resolved through full litigation on the merits. It is for this reason that the Debtor relied on *Orion Pictures Corp. v. Showtime Networks, Inc.* (*In re Orion Pictures Corp.*), 4 F.3d 1095, 1098-99 (2d Cir. 1993) (holding that motions to assume are summary proceedings and not the proper setting for resolving the merits of the parties' claims), and similar authority.

holding that under § 365(b)(2)(D), the Debtor was not required to cure nonmonetary defaults before assuming the Leases with Petitioners. *In re Bankvest Capital Corp.*, 360 F.3d 291, 301 (1st Cir. 2004) (*Bankvest III*). Finding the text of § 365(b)(2)(D) ambiguous, and the legislative history unhelpful, the First Circuit focused on the "practical considerations of bankruptcy policy and Congress's overarching purposes in the Bankruptcy Code" and concluded that the statute excused debtors from curing penalty rates as well as nonmonetary defaults prior to assumption. *Bankvest III*, 360 F.3d at 297-300. In so doing, the First Circuit noted that many nonmonetary defaults are "historical facts" that are incapable of being cured, and thus, requiring a debtor to cure such defaults would prevent the debtor from assuming any contract in which such a default had occurred. *Bankvest III*, 360 F.3d at 299-300. This, the Court explained, would "undermine[] Congress's basic purpose in § 365: to promote 'the successful rehabilitation of the business for the benefit of both the debtor and all its creditors.'" *Bankvest III*, 360 F.3d at 300 (quoting *Mason v. Official Comm. of Unsecured Creditors* (*In re FBI Distrib. Corp.)*, 330 F.3d 36, 45 (1st Cir. 2003)). The First Circuit added that this interpretation of § 365(b)(2)(D) was consistent with the remaining subparagraphs in § 365(b)(2) and was not inconsistent with any legislative history. *Bankvest III*, 360 F.3d at 300-01. Finally, the Court emphasized that although the Debtor was now free to assume the Leases and file an action for outstanding payments, the assumption proceeding was not the place to resolve issues related to Petitioners' defenses and counterclaims for damages. *Bankvest III*, 360 F.3d at 301-02.

III. Concurrent Proceedings On The Merits

On or about October 17, 2003, the Debtor commenced actions against Petitioners, by two separate complaints (the "Complaints"), in the Suffolk County Superior Court of the Commonwealth of Massachusetts.[9] *See* Appendices A and B hereto. By the Complaints, Bankvest seeks to collect monies due under the Leases from Petitioners, as lessees and guarantors, and to recover the Equipment which Petitioners have refused to return. The Complaints allege counts against Petitioners for breach of the Leases and breach of guaranties, and seek, among other things, $608,911.32 (47 past due payments of $12,955.56) from Eagle Insurance Company and $475,255.54 (47 past due payments of $10,111.82) from Newark Insurance Company.

On or about April 1, 2004, Petitioners filed answers and counterclaims to the Complaints.[10] *See* Appendices C and D

9. The Debtor's suit against Eagle Insurance Company is styled *Bankvest Capital Corp. v. Eagle Insurance Company, Newark Insurance Company and Material Damage Adjustment Corp.*, No. 03-4936 (Mass. filed Oct. 17, 2003) (Newark and Material Damage Adjustment Corp. are joined as guarantors). The Debtor's suit against Newark Insurance Company is styled *Bankvest Capital Corp. v. Newark Insurance Company, Eagle Insurance Company and Material Damage Adjustment Corp.*, No. 03-4937 (Mass. filed Oct. 17, 2003) (Eagle and Material Damage Adjustment Corp. are joined as guarantors).

10. The answers and counterclaims were not filed until approximately five months after the filing of the Complaints because of various positions taken by Petitioners. First, Petitioners filed motions to dismiss the Complaints based upon a lack of standing, alleging that, under the Plan, Bankvest lacked standing to sue in its own name. These motions were ultimately withdrawn by Petitioners on the hearing date. Petitioners then further delayed filing their (Cont'd)

hereto. Petitioners have asserted numerous defenses including (1) failure of consideration; (2) failure to deliver the equipment that was the subject of the lease; (3) promissory estoppel; (4) waiver; (5) fraudulent inducement to execute the Certificates; (6) that the Leases have not been assumed and the Debtor's claims will be barred if the Leases are rejected;[11] (7) that the Debtor breached the agreements before Petitioners; and (8) alteration of the terms of the Leases without the consent of the guarantors. Petitioners have also counterclaimed for (1) breach of the Leases for failure to deliver; (2) fraud in the inducing of the Petitioners' execution of the Certificates; (3) promissory estoppel with respect to the enforcement of the Certificates; (4) fraud based on the Debtor's alleged knowledge that it would not have the financial ability to perform under the Leases; and (5) rescission based on a failure of consideration.

(Cont'd)
response, based upon their assertion that they needed relief from the automatic stay to assert counterclaims. Bankvest consented to such relief from stay as soon as practicable after the issue was raised, and an agreed order providing for stay relief was approved by the Bankruptcy Court.

11. The Debtor has sought to assume the Leases during the pendency of the appeals, but Petitioners have opposed such relief, notwithstanding their failure to even seek a stay of the Bankruptcy Court Order. On January 22, 2004, over Petitioners' objection, the Bankruptcy Court approved the assumption of the Leases pursuant to a stipulation between Bankvest and its secured creditor Ark CLO 2000-1, Limited, which has a security interest in the Leases and their proceeds. Thereafter, Petitioners moved for rehearing. The Debtor attempted to address Petitioners' concerns in an amended stipulation – to which Petitioners continue to object. The matter is presently pending before the Bankruptcy Court.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Among The Courts Of Appeals

As this Court has repeatedly stated, where the asserted basis for the Court's grant of a petition is a purported conflict, but an accurate analysis of the facts and circumstances of the cases shows that there really is none, the grant of certiorari is inappropriate. *Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813, 813 (1931); *Sanchez v. Borras*, 283 U.S. 798, 798-99 (1931); *Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 392-93 (1923). With respect to the instant Petition, there is no conflict among the Courts of Appeals because no Court of Appeals other than the First Circuit in the case below has addressed the issue of the application of § 365(b)(2)(D) in the context of an alleged default which would nonetheless be litigated in another forum. *See* Honorable John M. Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L. J. 108, 111-12 (1959) (decisions are not conflicting where differences between Circuit Court decisions "can fairly be accounted for on the basis of variations in the factual situations among the cases involved").

Petitioners assert that the First Circuit's decision below conflicts with the Ninth Circuit's decision in *Worthington v. General Motors Corp. (In re Claremont Acquisition Corp.)*, 113 F.3d 1029 (9th Cir. 1997). However, the decision below and the *Claremont* decision involved such substantially different facts that they cannot be said to be truly conflicting. The *Claremont* case involved the assumption and assignment by the debtor of an automobile franchise agreement. *Claremont*, 113 F.3d at 1030-31. Prior to filing for bankruptcy, the debtor-automobile franchisee had closed for a period of two weeks in violation of the terms of the franchise agreement. *Claremont*, 113 F.3d at 1032-33. It was

undisputed that the two-week closure had occurred and that such closure caused the debtor to be in default of the franchise agreement. *Claremont*, 113 F.3d at 1032-33 (9th Cir. 1997). The Ninth Circuit Court of Appeals found that the closure was a nonmonetary default which was incapable of being cured. *Claremont*, 113 F.3d at 1033. Holding contrary to both the *Claremont* bankruptcy court and district court, the Ninth Circuit found that assumption was thereby prohibited, and that § 365(b)(2)(D) did not excuse the debtor from curing a nonmonetary default (but rather addressed only penalty rates and penalty provisions). *Claremont*, 113 F.3d at 1033-35.

That there had been a default on the franchise agreements in *Claremont* was not disputed, nor were there any other proceedings between the parties with respect to the existence of the default. Indeed, in *Claremont*, if the Court had applied § 365(b)(2)(D) as requested by the debtor in that case, there would be no further litigation of the claims raised by the franchisor. Unlike *Claremont*, in the present case, there is a dispute as to whether a default even occurred. Moreover, from the inception of the dispute regarding assumption, Bankvest has stipulated on the record that Petitioners could assert their defenses to payment in the state court litigation, which Bankvest has instituted to collect payments due under the Leases, and in which Petitioners have set forth defenses and counterclaims in pleadings filed in those actions. *See supra* 11-12 and Appendices A-D hereto. Both the Bankruptcy Appellate Panel and the First Circuit recognized that there was nothing wrong with a debtor's assumption of a contract knowing there would be ensuing litigation on the contract. *Bankvest III*, 360 F.3d at 301-02; *Bankvest II*, 290 B.R. at 448; App. 264-65. In this regard, the lower courts focused on the summary nature of the assumption proceedings, as explained by *Orion Pictures Corp. v. Showtime Networks, Inc.* (*In re Orion Pictures Corp.*), 4 F.3d 1095, 1098-99 (2d Cir. 1993). *See infra* Part V.

Moreover, and unlike *Claremont*, the courts in the present case repeatedly emphasized that, because it was the *Debtor* who was to receive all payments under the Leases, it was in the best interests of the Debtor, the estate and creditors that the litigation on the merits of the parties' respective claims go forward to permit the Debtor to recover the substantial value of the Lease payments due for the estate, while at the same time providing a forum for Petitioners to litigate their defenses to payment. *Bankvest III*, 360 F.3d at 295, 301-02; *Bankvest II*, 290 B.R. at 447-48; *Bankvest I*, 270 B.R. at 544; App. 264-65; 236-37.

The existence of these distinguishing factors — the continuing ability to litigate disputed issues of whether a default has even occurred (which issues are currently being litigated on the merits) and that payment was due *to* the Debtor (not *from* the Debtor), serve to render the present case fully distinct from *Claremont*. Indeed, the fact that in the present case there is a dispute as to whether the Debtor was in default, which dispute is now being litigated on the merits in state court,[12] not only distinguishes the present case from *Claremont*, but also from all of the other cases which have even mentioned § 365(b)(2)(D) (whether directly or by implication).[13]

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12. Moreover, this litigation can proceed even in the absence of an assumption setting because Petitioners, as non-debtor parties, are obligated to perform their obligations under the Leases prior to rejection or assumption. *See, e.g., Pub. Serv. Co. of New Hampshire v. New Hampshire Elec. Coop., Inc.* (*In re Pub. Serv. Co. of New Hampshire*), 884 F.2d 11, 14-15 (1st Cir. 1989) (prior to assumption or rejection, "the executory contract remains in effect and creditors are bound to honor it").

13. *See Three Sisters Partners, L.L.C. v. Harden* (*In re Shangra-La, Inc.*), 167 F.3d 843, 848 n.3 (4th Cir. 1999) (default not in issue; only discussed § 365(b)(2)(D) in a footnote to acknowledge that default rate interest is not available for nonmonetary defaults); (Cont'd)

For the foregoing reasons, the decisions of the First and Ninth Circuits are clearly distinguishable on their facts, thus negating the existence of any true conflict and rendering a grant of certiorari inappropriate.

(Cont'd)

In re Williams, 299 B.R. 684, 685 (Bankr. S.D. Ga. 2003) (court found debtor had defaulted by driving leased truck for another company); *In re Walden Ridge Dev., LLC*, 292 B.R. 58, 65-68 (Bankr. D.N.J. 2003) (court made findings of fact on motion to assume); *In re New Breed Realty Enters., Inc.*, 278 B.R. 314, 316-17 (Bankr. E.D.N.Y. 2002) (debtor's failure to purchase property was undisputed); *In re Phoenix Bus. Park Ltd. P'ship.*, 257 B.R. 517 (Bankr. D. Ariz. 2001) (did not involve nonmonetary default); *Yates Dev., Inc. v. Old Kings Interchange, Inc.* (*In re Yates Dev., Inc.*), 241 B.R. 247, 255 (Bankr. M.D. Fla. 1999), *aff'd on other grounds*, 256 F.3d 1285 (11th Cir. 2001) (unnecessary to reach § 365(b)(2)(D) argument because it was "without dispute" that there had been no default); *In re Vitanza*, No. 98-19611, 1998 Bankr. LEXIS 1497, at *89-90 (Bankr. E.D. Pa. Nov. 13, 1998) (default was not in dispute, was not material and would not continue); *In re W. Pac. Airlines, Inc.*, 219 B.R. 298, 299-300 (Bankr. D. Colo. 1998), *rev'd on other grounds*, 219 B.R. 305 (D. Colo. 1998) (on declaratory judgment action defaults were not disputed); *In re Ernst Home Ctr., Inc.*, 209 B.R. 955, 963 n.6 (Bankr. W.D. Wash. 1997) (no motion to assume had been filed; issue was whether damages constituted a penalty); *In re GP Express Airlines, Inc.*, 200 B.R. 222, 233 (Bankr. D. Neb. 1996) (court made findings of fact that there were nonmonetary defaults).

II. Even If The Rulings Of The Courts Of Appeals Were Viewed As Conflicting, Supreme Court Review Is Not Called For, As Additional Case Law Is Desirable To Assess The Effect Of § 365(b)(2)(D) In Application

"'It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.'" Justice Stevens, Opinion Respecting the Denial of the Petition for Writ of Certiorari, *Singleton v. Comm'r of Internal Revenue*, 439 U.S. 940, 943 (1978) (quoting Justice Frankfurter, Opinion Respecting the Denial of the Petition for Writ of Certiorari, *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950)). In the present case, several factors suggest that even if the Court viewed the First Circuit and the Ninth Circuit as being in conflict regarding the interpretation of § 365(b)(2)(D), notwithstanding the disparity in factual context, certiorari should nonetheless be denied. First, the provision is relatively "young" and has only been addressed by two Courts of Appeals, both of which faced very different facts.

Since its enactment in 1994, only two Courts of Appeals have addressed the issue of the impact of § 365(b)(2)(D) in the context of a nonmonetary default: the First Circuit below, and the Ninth Circuit in *Claremont*. Further, these two cases are not only factually distinct from each other, as set forth above, but *Claremont* entails other unique circumstances.[14] With such minimal adjudication, in view of the disparate facts of these cases, there is insufficient law developed to warrant review by

14. Specifically, *Claremont* involved the assumption of a franchise agreement. Franchise agreements are considered a special type of agreement in that the franchisor has a particular interest in the exercise of the franchise rights that is not necessarily present in most contracts. *See, e.g., Vitanza*, 1998 Bankr. LEXIS 1497, at *82-88 (distinguishing *Claremont* and other cases involving franchise agreements on the basis that such agreements are subject to unique state statutory restrictions).

this Court. *See, e.g.*, Honorable John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982) ("experience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved . . . The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result").[15]

Petitioners suggest, contrary to their assertions in the courts below,[16] that the potential interpretations of § 365(b)(2)(D) are so disparate already that "the issue is not one that will eventually accrue a majority of circuits on one side or another and, thereby, converge on one interpretation." Petition at 13. Petitioners

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15. Particularly in view of the disparate factual circumstances in the present case and *Claremont*, although the First Circuit stated that it disagreed with the Ninth Circuit in rendering its decision, such statements are not dispositive of whether a conflict does indeed exist sufficient to require this Court's intervention. *See, e.g., Mayes v. Pickett*, 537 F.2d 1080, 1083-84 (9th Cir. 1976), *cert. denied*, *United States v. Mayes*, 431 U.S. 924 (1977) (certiorari denied even though Court of Appeals decision stated that there was a conflict among the Circuits, and even though Court of Appeals expressed the desire for the Supreme Court to address the issue).

16. For instance, in their opening brief to the First Circuit, Petitioners argued that § 365(b)(2)(D) has been interpreted by courts as either: (1) "not . . . excus[ing] a debtor from curing nonmonetary defaults" or, (2) as meaning "a debtor is excused from curing all nonmonetary defaults." Pet'r First Cir. Br. at 13. *See also* Petitioners' Moving Brief to the Appellate Panel, dated March 18, 2002 at 9, 12 ("Pet'r App. Pan. Br.") (drawing the same binary distinction in the case law). Petitioners further argued that the proper interpretation of the statute was the former, and that adopted by the *Claremont* case. Pet'r First Cir. Br. at 21-25; Pet'r App. Pan. Br. at 7-9. Now, Petitioners have changed course with respect to the Ninth Circuit's interpretation of the statute, arguing that "neither the Ninth Circuit's reading of the statute nor the First Circuit's are entirely satisfactory." Petition at 14.

attempt to support their argument that this Court must provide a "definitive interpretation" of § 365(b)(2)(D) by pointing to what they argue are other "possible readings of the subsection" (besides those given by the First and Ninth Circuits): one "arguably different explanation" by the Fourth Circuit (in *In re Shangra-La, Inc.*, 167 F.3d 843 (4th Cir. 1999)), and "[y]et another explanation – and perhaps the best explanation – not yet adopted in a published opinion" (Petitioners' own concoction). Petition at 12-14.

With respect to the *Shangra-La* case, Petitioners repeatedly, albeit incorrectly, argued to the courts below that *Shangra-La* was consistent with *Claremont* in interpreting § 365(b)(2)(D) as not excusing a debtor from curing nonmonetary defaults. Now, in an attempt at mustering support for their argument that the Court's intervention is required to prevent hypothetical mayhem in the lower federal courts, and in a complete reversal of position, Petitioners argue that *Shangra-La* comes to a conclusion contrary to both the First and Ninth Circuits. Petition at 12. This is incorrect. *Shangra-La* did not involve a motion to assume (indeed, the bankruptcy court had already permitted assumption); rather, the non-debtor party had made a request for post-petition attorneys' fees. *Shangra-La*, 167 F.3d at 845. On appeal, the non-debtor party sought review of the lower court decisions denying the request with respect to post-petition fees. *Shangra-La*, 167 F.3d at 847. The *Shangra-La* court's reference to § 365(b)(2)(D) was in passing in a footnote, given as an example of the Bankruptcy Code's elimination of "some of the more onerous anti-debtor provisions that can be negotiated at arms length under state law." *Shangra-La*, 167 F.3d at 848 n.3. There is no other discussion of the provision in the case. Petitioners' attempted extension of one sentence in a footnote on a matter which was not even before the *Shangra-La* court is unpersuasive

and misleading. Therefore, the *Shangra-La* case cannot be said to have offered an interpretation of the statute that is either of precedential significance or creates cause for concern that the interpretation of § 365(b)(2)(D) will create a state of confusion.[17]

Indeed, it is worth noting that Petitioners do not actually state that the decisions below were wrong (calling into question the basis for their Petition), but urge this Court to opine on its own "definitive interpretation" of the provision. Petition at 14. Such review would be an inappropriate

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17. Further attempting to support their argument that this Court must definitively interpret the statute, Petitioners argue now for a supposed interpretation that, according to Petitioners, has not been adopted by any court but should be. Petition at 12. In other words, Petitioners posit that the Court should "legislate" the meaning of the statute in a manner that only Petitioners have heretofore considered. Not only is this again contrary to Petitioners' arguments below, but it seems clearly designed not to address the merits of *this* case, but merely concocted to muster support for the argument that courts will not come to a consistent interpretation of the provision. Such unfounded hypotheticals and contradictory arguments are not proper bases for the grant of certiorari.

In addition, Petitioners now argue that the legislative history on § 365(b)(2)(D) is both "scant at best" and "unlikely to contribute to a harmonization of the future understanding of the subsection." Petition at 13-14. Petitioners' argument is entirely contradictory to the positions taken by them below. *See, e.g.*, Pet'r First Cir. Br. at 14 ("The Legislative History Unequivocally Demonstrates Congress' Intent."). Further, it inexcusably ignores the distinction between the role of the Court and that of Congress. Petitioners' argument that "[o]nly this Court can issue an opinion that will instruct the courts as to the application of § 365(b) to carry out the legislative intent" (Petition at 16-17) is internally inconsistent with their position, only now for the first time taken, that the legislative history does not reveal legislative intent.

exercise of judicial discretion. These principles, and the present circumstances, indicate that denial of certiorari is the most appropriate course for this Court to follow.

III. Petitioners Exaggerate The Severity Of The Issues In The Case And Improperly Attempt To Impute Issues Not Presented By This Case

In an effort to market their case, Petitioners present a purported parade of horribles they claim will occur if certiorari is not granted. Petition at 17-19. None of the concerns raised by Petitioners is implicated by this case. Petitioners' simplistic examples ignore well-established bankruptcy law that negates their professed concerns. Finally, Petitioners misstate the overall impact of this case on the balance between debtor and creditor rights and ignore the extreme inequity that would result by precluding the Debtor from assuming the defaulted Leases in the exercise of its business judgment.

Petitioners' examples of purportedly problematic consequences of the First Circuit's ruling ignore the fact that *in this case* Petitioners were always going to have the opportunity to assert their alleged claims – which are actually alleged *defenses to payment*. Indeed, since the filing of the Requests, the Debtor has stipulated on the record that Petitioners may assert their alleged defenses in an action on the merits, which action is currently proceeding, and in which Petitioners have set forth defenses and counterclaims.[18]

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18. Thus, Petitioners' argument regarding § 1126(2)(A) (sic) (Petitioners apparently intended to refer to § 1124(2)(A)) and related sections is without merit. Petition at 20. There is no basis for their assertion that § 1124 (which governs impairment of claims or interests) prevents litigation of their defenses. More importantly, Petitioners fail to advise this Court that the Debtor has stipulated in filings with the Bankruptcy Court to the right of Petitioners to litigate their defenses, and that such defenses are actually being litigated now in state court.

See supra 11-12. Thus, under the actual facts of this case, there can be no parade of horribles.

Petitioners vastly overstate the potential consequences of this case, at least in part because they ignore the existence of other bankruptcy law, including Supreme Court precedent, which protects non-debtor parties to executory contracts and leases whose agreements are assumed by the debtor in bankruptcy. For instance, authority is uniform that once an executory contract is assumed, both parties to the contract – the debtor and the non-debtor – must perform under the contract according to its terms. *See, e.g., N.L.R.B. v. Bildisco*, 465 U.S. 513, 531 (1984) ("[s]hould the debtor-in-possession elect to assume the executory contract . . . it assumes the contract *cum onere*") (internal citations omitted). Thus, for example, Petitioners' argument regarding the potential problems relating to "the handling of hazardous materials or wastes" (Petition at 18), the implication of which is that a hazardous condition would be permitted to continue, is incorrect because such a condition is a *continuing* wrong which, if not resolved by the debtor or assignee to an executory contract at the time of assumption, would either preclude assumption of a contract or result in the commencement of an action by the non-debtor party, post-assumption, if the debtor or assignee failed to abide by the terms of the contract. The same result would ensue with Petitioners' example regarding the failure to maintain auto insurance. Petition at 17. Thus, with respect to future performance by a debtor or its assignee, assumption will not place the third-party in a worse position than he had been in prior to bankruptcy or assumption. This uniform principle applies with respect to the other examples provided by Petitioners (Petition at 17-18), including construction contracts, franchise contracts and software licenses.

In this case, preventing the Debtor from assuming the contract with Petitioners such that, based on Petitioners' erroneous view, Petitioners would no longer be obligated to pay the over $1 million in arrears on the Leases, would bestow upon Petitioners an improper "windfall." In short, Petitioners would be able to have used the leased Equipment for five years almost entirely without payment to the Debtor. Particularly in view of the fact that the Debtor could have sued to recover the unpaid lease payments both prior to filing for bankruptcy, and prior to seeking assumption of the contract,[19] it would be inequitable to preclude assumption in this case just to prevent the Debtor from now taking the very course it could have taken outside of bankruptcy or pre-assumption. There is no justifiable reason why the Debtor should have less power in bankruptcy to enforce its state law rights in contracts and recover payments due thereunder than the Debtor would have outside of bankruptcy. Such inequity, a manifest windfall to the Petitioners, would work not only to the detriment of the Debtor, but also to creditors of the Debtor's estate.

In this way, Petitioners also misstate the overall impact of this case on the balance between debtor and creditor rights. The First Circuit's decision has not altered the balance between debtors and creditors. As can be seen from this very case, the potential impact of the First Circuit's interpretation of § 365(b)(2)(D) will vary depending on the circumstances of the case. Presently, the First Circuit's ruling permits the Debtor to assume the contracts in the exercise of its business judgment, and to sue to recover the substantial sums owed to the Debtor and the estate under the Leases, but still permits

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19. As noted above, the state court litigation against Petitioners was actually commenced in October 2003, prior to assumption.

Petitioners, the non-debtor parties, to have their alleged claims and defenses heard and determined in a court of competent jurisdiction. Thus, even were Petitioners' list of horribles hypothetically plausible, they simply do not apply to the particular facts of this case, and as such, a grant of certiorari on such grounds would be inappropriate.

IV. Certiorari Should Be Denied Because There Is No Real Case Or Controversy Between The Parties

Petitioners' request for certiorari should be denied because it is nothing more than an academic exercise. Indeed, because the determination of whether there is actually any default, nonmonetary or otherwise, is currently being litigated in state court, and may be so litigated regardless of the outcome of this appeal, there is no case or controversy before the Court. Petitioners will not be injured if the Petition is denied. If the state court litigation results in a determination of no default by the Debtor, the issue of whether a cure is required under § 365 is completely academic. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) ("Abstract injury is not enough . . . the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical'") (internal citation omitted). Under any circumstance, the only harm that Petitioners could possibly suffer is payment under the Leases to the extent permitted under applicable state law.

Petitioners' efforts here (and in every appeal they have taken) are a transparent attempt to prevent the Leases from being assumed based on their flawed position that the failure to assume, or a delay in assumption, bars the Debtor from suing to recover the approximately $1 million in unpaid Lease payments. However, even if this case were remanded to the Bankruptcy Court, there is nothing that would prevent the

Bankruptcy Court from abstaining from rendering a decision on assumption prior to permitting the underlying state court litigation to proceed to conclusion. Because the bankruptcy court would likely be required to permit the Debtor's state court actions to recover the unpaid lease payments to go forward in any event (*see* 28 U.S.C. § 1334(c)(1) (permissive abstention) or (2) (mandatory abstention)),[20] certiorari is unwarranted. *See, e.g., The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 183-84 (1959) (dismissing a writ of certiorari after oral argument and noting that party would be able to try its claim elsewhere).

Where the issue on which Petitioners seek to have this Court rule is not squarely presented in the very case which is the vehicle for the Petition, certiorari should be denied. This Court's review power is not designed to address purely academic or theoretical disputes but rather to address issues that relate to the cases before them. "While this Court decides questions of public importance, it decides them in the

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20. 28 U.S.C. § 1334(c) reads as follows:

> (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
>
> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *Monrosa*, 359 U.S. at 184.

V. The Decisions Of The Courts Below Were Correctly Decided

Ultimately, certiorari is unnecessary in this case because the decisions of the courts below were correct, both with respect to the issue of whether § 365(b)(2)(D) requires that a debtor cure nonmonetary defaults as a condition to assumption, and as to whether any claims or defenses available to Petitioners should be addressed in the context of an action already underway in state court and not during the summary proceeding of assumption.[21]

With respect to § 365(b)(2)(D), the lower courts correctly interpreted the provision as not requiring the Debtor to cure alleged nonmonetary defaults. While the Debtor believes that the language of the statute is unambiguous and thus should be followed, even if viewed otherwise, the results reached by the lower courts should be affirmed.[22] Thus, to the extent

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21. Although the Debtor does not believe certiorari is warranted or appropriate in this case, to the extent that the Court determined to grant certiorari, on the merits, the Debtor would seek to rely on all grounds for affirmance presented by the record before the courts below, and respectfully reserves its rights with respect thereto. *See Bennett v. Spear*, 520 U.S. 154, 166-67 (1997) (in deciding whether to affirm the dismissal of petitioners' suit, Court considered alternative grounds that were raised in the courts below and briefed and argued in the Supreme Court, despite the fact that these grounds were never considered by the lower courts, because "[a] respondent is entitled . . . to defend the judgment on any ground supported by the record").

22. While the First Circuit found the language of § 365(b)(2)(D) ambiguous (*Bankvest III*, 360 F.3d at 297), both the Bankruptcy Court

(Cont'd)

that the Court viewed § 365(b)(2)(D) as ambiguous, such ambiguity must be resolved with due consideration of the policy and practical implications involved, particularly in light of the fact that the legislative history of the section is too sparse to be of assistance. As the First Circuit stated, preventing debtors from assuming executory contracts or leases based on the existence of an uncurable nonmonetary default

> cannot, in our view, be what Congress intended. To prevent a debtor from assuming a contract based on historical events that it cannot remedy undermines Congress's basic purpose in § 365: to promote the successful rehabilitation of the business for the benefit of both the debtor and all its creditors. This case well illustrates the force of that concern. Eagle and Newark together owe BankVest approximately $1 million in unpaid rent. Yet they argued to the bankruptcy court that BankVest's failure to complete delivery of the leased equipment is an historical fact not susceptible to cure. So rather than simply seek an offset for any pecuniary harm they may have suffered, Eagle and Newark would deny the estate all $1 million in unpaid rent by compelling BankVest to cure what they allege is incurable. That is plainly inconsistent with Congress's purpose in the Bankruptcy Code to maximize the value of the estate for all creditors.

Bankvest III, 360 F.3d at 300 (internal citations, quotations and footnotes omitted).

(Cont'd)

and the Bankruptcy Appellate Panel found the plain language reading of the provision disclosed that the provision did not require a debtor to cure nonmonetary defaults prior to assumption of an executory contract or lease. *Bankvest II*, 290 B.R. at 447; App. 263; *Bankvest I*, 270 B.R. at 543-44; App. 236-37.

In addition to their respective holdings with respect to § 365(b)(2)(D), the courts below recognized the summary nature of a motion to assume. *Bankvest III*, 360 F.3d at 302; *Bankvest II*, 290 B.R. at 447-48; App. 263-64; *Bankvest I*, 270 B.R. at 544; App. 237. As explained by the Bankruptcy Appellate Panel, the only issue properly before the bankruptcy court during such proceeding is whether assumption or rejection of the contract is based upon the debtor's good business judgment. *Bankvest II*, 290 B.R. at 447-48; App. 263-64. Citing to *Orion Pictures Corp. v. Showtime Networks, Inc.* (*In re Orion Pictures Corp.*), 4 F.3d 1095, 1098-99 (2d Cir. 1993), the First Circuit also confirmed that the assumption or rejection proceeding is not the place for resolving the underlying defenses or counterclaims of the non-debtor party. *Bankvest III*, 360 F.3d at 302. In *Orion*, the bankruptcy court granted the debtor's motion to assume an executory contract under 11 U.S.C. § 365(a). *Orion*, 4 F.3d at 1097. In connection therewith, the court ruled that the debtor did not breach certain provisions of the contract which the debtor sought to assume over the objection of the non-debtor. *Orion*, 4 F.3d at 1097. The Second Circuit reversed both the bankruptcy court and the district court and held that it was error for the bankruptcy court to decide contractual disputes in the context of deciding a motion to assume or reject. *Orion*, 4 F.3d at 1098. The Second Circuit stated that

> [a]t heart, a motion to assume should be considered a summary proceeding, intended to efficiently review the trustee's or debtor's decision to adhere to or reject a particular contract in the course of the swift administration of the bankruptcy estate. It is not the time or place for prolonged discovery or a lengthy trial with disputed issues.

Orion, 4 F.3d at 1098-99.

The emphasis by the lower courts on this aspect of the case provides another reason why this Court should abstain from granting certiorari, even if the Court viewed the decisions of the First and Ninth Circuit as conflicting. *See, e.g., Goett v. Union Carbide Corp.*, 361 U.S. 340, 344-45 (1960) (Harlan, J., dissenting) (arguing that remand to the Court of Appeals was inappropriate where the Court of Appeals had "exercised the traditional discretion of any court to choose what appears to it a narrower and clearer ground of decision in preference to a broader and more controverted one," and noting that the Supreme Court did not suggest that the Court of Appeals exceeded its discretion in deliberately deciding that it need not reach the difficult issue about which there was a conflict in authority).

The effect of the courts' rulings below is to require Petitioners, who are presently litigating defenses and claims in state court collection actions, to adhere to the obligations Petitioners undertook pursuant to negotiated contracts governed by state law. The rulings prevent Petitioners from invoking *debtor* protections set forth in § 365 to defeat the Debtor's state law rights to sue on such contracts. *See Butner v. United States*, 440 U.S. 48, 54 (1979).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FREDERIC D. GRANT, JR.
727 Atlantic Avenue
Second Floor
Boston, MA 02111
(857) 204-3210

JAY L. GOTTLIEB*
SUSAN G. ROSENTHAL
ARIANNA FRANKL
SHERYL ALTWERGER
BROWN RAYSMAN MILLSTEIN
FELDER & STEINER LLP
900 Third Avenue
New York, NY 10022
(212) 895-2000

* *Counsel of Record*

Counsel for Respondent

APPENDIX A — COMPLAINT OF BANKVEST CAPITAL CORP. AGAINST EAGLE INSURANCE COMPANY, ET AL. DATED OCTOBER 17, 2003

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
CIVIL ACTION NO.
03-4936-C

SUFFOLK, ss.

BANKVEST CAPITAL CORP.,

Plaintiff,

v.

EAGLE INSURANCE COMPANY, NEWARK INSURANCE COMPANY and MATERIAL DAMAGE ADJUSTMENT CORP.,

Defendants.

COMPLAINT

INTRODUCTION

Plaintiff BankVest Capital Corp. seeks to collect amounts due under and pursuant to a defaulted equipment lease from lessee Eagle Insurance Company and guarantors Newark Insurance Company and Material Damage Adjustment Corp. and to recover possession of leased property which defendants refuse to return.

Appendix A

PARTIES

1. Plaintiff BankVest Capital Corp. is a Massachusetts corporation.

2. Defendant Eagle Insurance Company is an insurance company organized under the laws of the State of New York with a principal place of business in Bethpage, New York.

3. Defendant Newark Insurance Company is an insurance company organized under the laws of the State of New York with a principal place of business in Bethpage, New York.

4. Defendant Material Damage Adjustment Corp. is a corporation organized under the laws of the State of New York with a principal place of business in Bethpage, New York.

JURISDICTION AND VENUE

5. This Court has jurisdiction of this civil action which seeks damages and judgment for possession of plaintiff's property. Mass. Gen. Laws ch. 212, § 4.

6. This Court has venue of this civil action which is between parties nonresident. Mass. Gen. Laws Ann. ch. 223, § 1.

Appendix A

COUNT I

(Breach of Equipment Lease dated as of May 27, 1999)
(BankVest Capital Corp. v. Eagle Insurance Company)

7. The allegations contained in paragraphs 1 through 6 are realleged as if fully set forth in this paragraph.

8. On or about May 27, 1999, defendant Eagle Insurance Company "Eagle") executed a Master Equipment Lease Agreement (the "Lease"). A true and correct copy of the Lease is attached hereto and marked as Exhibit A.

9. On or about June 29, 1999, Eagle executed Lease Schedule No. 001 (the "Schedule"). A true and correct copy of the Schedule is attached hereto and marked as Exhibit B.

10. On or about August 25, 1999, Eagle executed an Acceptance Certificate (the "Certificate"). A true and correct copy of the Certificate is attached hereto and marked as Exhibit C.

11. Under the Lease, the Schedule and the Certificate, Eagle agreed to pay the lessor $12,955.56 per month for forty-eight months ($11,940.61 per month plus sales and use tax of $1,014.95 per month).

12. The Lease was of computer equipment (the "Property") which was acquired for and received by Eagle at its direction at the start of the Lease. The Property has not been returned to plaintiff.

13. The Lease is governed by Massachusetts law and defendants consented to the jurisdiction of, and venue in, any court located within Massachusetts.

14. Plaintiff BankVest Capital Corp. is the owner and holder of the Lease.

15. Eagle has failed and refused to make payments which are due under the Lease and has otherwise defaulted in its obligations thereunder.

16. Under and pursuant to the terms of the Lease, Eagle is liable to pay: (A) $608,911.32 (47 past due payments of $12,955.56); (B) late charges and fees; (C) interest, costs and attorneys' fees and expenses; *plus* (D) other amounts due under the Lease *less* (E) any repossession proceeds (should the Property be recovered from defendant).

17. Eagle owes BankVest Capital Corp. $608,911.32+ under and pursuant to the terms of the Lease, plus late charges, interest, costs and attorneys' fees.

18. Eagle has failed to return the Property to BankVest Capital Corp.

19. Eagle does not own the Property and should be ordered to return the Property to BankVest Capital Corp.

Appendix A

COUNT II

(Breach of Guaranty)
(BankVest Capital Corp. v. Newark Insurance Company)

20. The allegations contained in paragraphs 1 through 19 are realleged as if fully set forth in this paragraph.

21. On or about June 29, 1999, the defendant Newark Insurance Company ("Newark") executed a guaranty of the Lease (the "Newark Guaranty"). A true and correct copy of the Newark Guaranty is attached hereto as Exhibit D.

22. The Newark Guaranty is governed by Massachusetts law and Newark consented to the jurisdiction of, and venue in, any court located within Massachusetts.

23. Eagle has defaulted in the performance of its obligations under the Lease and owes $608,911.32+, plus late charges, interest, costs and attorneys' fees, to BankVest Capital Corp.

24. Newark owes $608,911.32+ to BankVest Capital Corp. under and pursuant to the terms of the Newark Guaranty and the Lease, plus late charges, interest, costs and attorneys' fees.

Appendix A

COUNT III

(Breach of Guaranty)
(BankVest Capital Corp. v. Material Damage Adjustment Corp.)

25. The allegations contained in paragraphs 1 through 19 are realleged as if fully set forth in this paragraph.

26. On or about June 29, 1999, the defendant Material Damage Adjustment Corp. executed a guaranty of the Lease (the "Material Guaranty"). A true and correct copy of the Material Guaranty is attached hereto as Exhibit E.

27. The Material Guaranty is governed by Massachusetts law and Material Damage Adjustment Corp. consented to the jurisdiction of, and venue in, any court located within Massachusetts.

28. Eagle has defaulted in the performance of its obligations under the Lease and owes $608,911.32+, plus late charges, interest, costs and attorneys' fees, to BankVest Capital Corp.

29. Material Damage Adjustment Corp. owes $608,911.32+ to BankVest Capital Corp. under and pursuant to the terms of the Material Guaranty and the Lease, plus late charges, interest, costs and attorneys' fees.

WHEREFORE, plaintiff BankVest Capital Corp. prays that this Court will enter the following relief:

1. Judgment for plaintiff BankVest Capital Corp. against defendants, jointly and severally, for $608,911.32 plus late charges, costs and all other amounts due under the Lease or guaranties, bearing interest as provided for in the Lease and under applicable law;

2. Judgment for plaintiff BankVest Capital Corp. against defendant Eagle Insurance Company for immediate possession of the Property described above, and that plaintiff's judgment be reduced by such amount as plaintiff receives from the sale, lease or other disposition of the Property as provided in the Lease after deducting costs and expenses of recovery and sale of the Property;

3. Judgment against defendants, jointly and severally, for plaintiff's reasonable attorney fees and expenses; and

4. Such other and further relief as is just.

BANKVEST CAPITAL CORP.

By its attorneys,
s/ Frederic D. Grant, Jr.
Frederic D. Grant, Jr.
BBO No. 543115
GRANT & RODDY
44 School Street, Suite 400
Boston, Massachusetts 02108-4200
(617) 248-8700 (Ext. 24) (Grant)

Appendix A

Dated: October 17, 2003
80400626
325014

[Exhibits A-E of Appendix A Intentionally Omitted]

APPENDIX B — COMPLAINT OF BANKVEST CAPITAL CORP. AGAINST NEWARK INSURANCE COMPANY, ET AL. DATED OCTOBER 17, 2003

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
CIVIL ACTION NO.
03-4937-E

SUFFOLK, ss.

BANKVEST CAPITAL CORP.,

Plaintiff,

v.

NEWARK INSURANCE COMPANY, EAGLE INSURANCE COMPANY and MATERIAL DAMAGE ADJUSTMENT CORP.,

Defendants.

COMPLAINT

INTRODUCTION

Plaintiff BankVest Capital Corp. seeks to collect amounts due under and pursuant to a defaulted equipment lease from lessee Newark Insurance Company and guarantors Eagle Insurance Company and Material Damage Adjustment Corp. and to recover possession of leased property which defendants refuse to return.

Appendix B

PARTIES

1. Plaintiff BankVest Capital Corp. is a Massachusetts corporation.

2. Defendant Newark Insurance Company is an insurance company organized under the laws of the State of New York with a principal place of business in Bethpage, New York.

3. Defendant Eagle Insurance Company is an insurance company organized under the laws of the State of New York with a principal place of business in Bethpage, New York.

4. Defendant Material Damage Adjustment Corp. is a corporation organized under the laws of the State of New York with a principal place of business in Bethpage, New York.

JURISDICTION AND VENUE

5. This Court has jurisdiction of this civil action which seeks damages and judgment for possession of plaintiff's property. Mass. Gen. Laws ch. 212, § 4.

6. This Court has venue of this civil action which is between parties nonresident. Mass. Gen. Laws Ann. ch. 223, § 1.

Appendix B

COUNT I

(Breach of Equipment Lease dated as of May 27, 1999)
(BankVest Capital Corp. v. Newark Insurance Company)

7. The allegations contained in paragraphs 1 through 6 are realleged as if fully set forth in this paragraph.

8. On or about May 27, 1999, defendant Newark Insurance Company ("Newark") executed a Master Equipment Lease Agreement (the "Lease"). A true and correct copy of the Lease is attached hereto and marked as Exhibit A.

9. On or about June 29, 1999, Newark executed Lease Schedule No. 002 (the "Schedule"). A true and correct copy of the Schedule is attached hereto and marked as Exhibit B.

10. On or about August 25, 1999, Newark executed an Acceptance Certificate (the "Certificate"). A true and correct copy of the Certificate is attached hereto and marked as Exhibit C.

11. Under the Lease, the Schedule and the Certificate, Newark agreed to pay the lessor $10,111.82 per month for forty-eight months.

12. The Lease was of computer equipment (the "Property") which was acquired for and received by Newark at its direction at the start of the Lease. The Property has not been returned to plaintiff.

Appendix B

13. The Lease is governed by Massachusetts law and defendants consented to the jurisdiction of, and venue in, any court located within Massachusetts.

14. Plaintiff BankVest Capital Corp. is the owner and holder of the Lease.

15. Defendant Newark has failed and refused to make payments which are due under the Lease and has otherwise defaulted in its obligations thereunder.

16. Under and pursuant to the terms of the Lease, Newark is liable to pay: (A) $475,255.54 (47 past due payments of $10,111.82); (B) late charges and fees; (C) interest, costs and attorneys' fees and expenses; *plus* (D) other amounts due under the Lease *less* (E) any repossession proceeds (should the Property be recovered from defendant).

17. Newark owes BankVest Capital Corp. $475,255.54+ under and pursuant to the terms of the Lease, plus late charges, interest, costs and attorneys' fees.

18. Newark has failed to return the Property to BankVest Capital Corp.

19. Newark does not own the Property and should be ordered to return the Property to BankVest Capital Corp.

Appendix B

COUNT II

(Breach of Guaranty)
(BankVest Capital Corp. v. Eagle Insurance Company)

20. The allegations contained in paragraphs 1 through 19 are realleged as if fully set forth in this paragraph.

21. On or about June 29, 1999, the defendant Eagle Insurance Company ("Eagle") executed a guaranty of the Lease (the "Eagle Guaranty"). A true and correct copy of the Eagle Guaranty is attached hereto as Exhibit D.

22. The Eagle Guaranty is governed by Massachusetts law and Eagle consented to the jurisdiction of, and venue in, any court located within Massachusetts.

23. Newark has defaulted in the performance of its obligations under the Lease and owes $475,255.54+, plus late charges, interest, costs and attorneys' fees, to BankVest Capital Corp.

24. Eagle owes $475,255.54+ to BankVest Capital Corp. under and pursuant to the terms of the Eagle Guaranty and the Lease, plus late charges, interest, costs and attorneys' fees.

Appendix B

COUNT III

(Breach of Guaranty) (BankVest Capital Corp. v. Material Damage Adjustment Corp.)

25. The allegations contained in paragraphs 1 through 19 are realleged as if fully set forth in this paragraph.

26. On or about June 29, 1999, the defendant Material Damage Adjustment Corp. executed a guaranty of the Lease (the "Material Guaranty"). A true and correct copy of the Material Guaranty is attached hereto as Exhibit E.

27. The Material Guaranty is governed by Massachusetts law and Material Damage Adjustment Corp. consented to the jurisdiction of, and venue in, any court located within Massachusetts.

28. Newark has defaulted in the performance of its obligations under the Lease and owes $475,255.54+, plus late charges, interest, costs and attorneys' fees, to BankVest Capital Corp.

29. Material Damage Adjustment Corp. owes $475,255.54+ to BankVest Capital Corp. under and pursuant to the terms of the Material Guaranty and the Lease, plus late charges, interest, costs and attorneys' fees.

Appendix B

WHEREFORE, plaintiff BankVest Capital Corp. prays that this Court will enter the following relief:

1. Judgment for plaintiff BankVest Capital Corp. against defendants, jointly and severally, for $475,255.54 plus late charges, costs and all other amounts due under the Lease or guaranties, bearing interest as provided for in the Lease and under applicable law;

2. Judgment for plaintiff BankVest Capital Corp. against defendant Newark Insurance Company for immediate possession of the Property described above, and that plaintiff's judgment be reduced by such amount as plaintiff receives from the sale, lease or other disposition of the Property as provided in the Lease after deducting costs and expenses of recovery and sale of the Property;

3. Judgment against defendants, jointly and severally, for plaintiff's reasonable attorney fees and expenses; and

4. Such other and further relief as is just.

BANKVEST CAPITAL CORP.

By its attorneys,
s/ Frederic D. Grant, Jr.
Frederic D. Grant, Jr.
BBO No. 543115
GRANT & RODDY
44 School Street, Suite 400
Boston, Massachusetts 02108-4200
(617) 248-8700 (Ext. 24) (Grant)

Appendix B

Dated: October 17, 2003
80400649
325039

[Exhibits A-E of Appendix B Intentionally Omitted]

APPENDIX C — ANSWER AND COUNTERCLAIM OF EAGLE INSURANCE COMPANY, ET AL. DATED APRIL 1, 2004

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
C.A. NO. 03-4936-C

BANKVEST CAPITAL CORP.,

Plaintiff,

v.

EAGLE INSURANCE COMPANY, NEWARK INSURANCE COMPANY and MATERIAL DAMAGE ADJUSTMENT CORP.,

Defendants.

ANSWER, COUNTERCLAIM AND JURY DEMAND

AND NOW, come Eagle Insurance Company ("Eagle"), Newark Insurance Company ("Newark") and Material Damage Adjustment Corp. ("MDAC") (collectively, the "Defendants") and respond to BankVest Capital Corp.'s ("BankVest") Complaint as follows:

1. Defendants lack the knowledge to either admit or deny the allegations contained in this paragraph and, therefore, deny same.

2. Admitted.

3. Admitted.

4. Admitted.

5. The allegations contained in this paragraph constitute conclusions of law to which no response is required and, therefore, Defendants deny same.

6. The allegations contained in this paragraph constitute conclusions of law to which no response is required and, therefore, Defendants deny same.

COUNT I

7. The foregoing paragraphs are incorporated by reference.

8. Defendants admit the allegations contained in the first sentence of this paragraph. Defendants deny that Exhibit A to the Complaint is a true and correct copy of the Master Equipment Lease Agreement.

9. Defendants admit the allegations contained in the first sentence of this paragraph. Defendants deny that Exhibit B to the Complaint is a true and correct copy of Lease Schedule No. 001.

10. Defendants admit that Eagle signed a document entitled "Acceptance Certificate." Defendants deny that Exhibit C to the Complaint is a true and correct copy of the document entitled Acceptance Certificate. By way of further response, Eagle executed the purported acceptance certificate

before the equipment was received and in reliance on BankVest's misrepresentation that it was its normal practice to obtain acceptance certificates before it delivered the equipment and that it would not claim the acceptance certificate had any legal effect unless and until the equipment was delivered in accordance with the lease.

11. The documents speak for themselves and any attempt to summarize or characterize them is denied.

12. Defendants deny that certain of the items listed in the Lease were acquired for and received by Eagle. As to the characterization of the Property as computer equipment, Defendants aver that the documents speak for themselves and any attempt to summarize or characterize them is denied. Defendants admit that Eagle has not returned to BankVest any of the items received by Eagle, but further avers that BankVest has not requested that Eagle return the portion of the equipment that Eagle did receive. Defendants further aver that Eagle is ready, willing and able to return to BankVest so much of the Property as BankVest owns, but it is unwilling to deliver to BankVest the equipment that was delivered to Eagle by the manufacturer as loaner-equipment and which equipment additionally is not described in or made a part of the Lease.

13. The allegations contained in this paragraph constitute conclusions of law to which no response is required and, therefore, Defendants deny same.

14. Defendants lack the knowledge to either admit or deny the allegations contained in this paragraph and, therefore, deny same.

Appendix C

15. Denied.

16. Denied.

17. Denied.

18. Defendants admit that Eagle has not returned to BankVest any of the items received by Eagle, but further avers that BankVest has not requested that Eagle return the portion of the equipment that Eagle did receive. Defendants further aver that Eagle is ready, willing and able to return to BankVest so much of the Property as BankVest owns, but it is unwilling to deliver to BankVest the equipment that was delivered to Eagle by the manufacturer as loaner equipment and which equipment additionally is not described in or made a part of the Lease.

19. Defendants admit that Eagle does not own the Property. The balance of the paragraph is denied.

COUNT II

20. Defendants incorporate the foregoing paragraphs.

21. Defendants admit the allegations contained in the first sentence of this paragraph. Defendants deny that Exhibit D to the Complaint is a true and correct copy of the guaranty signed by Newark.

22. The allegations contained in this paragraph constitute conclusions of law to which no response is required and, therefore, Defendants deny same.

23. Denied.

24. Denied.

COUNT III

25. Defendants incorporate the foregoing paragraphs.

26. Defendants admit the allegations contained in the first sentence of this paragraph. Defendants deny that Exhibit E to the Complaint is a true and correct copy of the guaranty signed by MDAC.

27. The allegations contained in this paragraph constitute conclusions of law to which no response is required and, therefore, Defendants deny same.

28. Denied.

29. Denied.

AFFIRMATIVE DEFENSES

1. BankVest's claims are barred by the defense of failure of consideration.

2. BankVest's claims are barred by its failure to deliver the equipment that was the subject of the lease between the parties.

3. BankVest's claims are barred by the defense of promissory estoppel.

4. BankVest's claims are barred by the doctrine of waiver.

5. BankVest's claims are barred on the grounds that it fraudulently induced Eagle to execute the so-called acceptance certificate.

6. The determination of whether BankVest may assume the Lease, pursuant to the provisions of section 365 of the Bankruptcy Code, has not been determined by final order. The foregoing claims are barred if BankVest ultimately rejects the Lease.

7. Count I is barred because BankVest breached the Lease before any alleged breach by Eagle.

8. Counts II and III are barred because BankVest materially altered the terms of the underlying agreement without the consent of the guarantors.

COUNTERCLAIMS

Facts

1. On or about May 27, 1999, Eagle entered into a Master Equipment Lease Agreement (the "Lease") with BankVest, pursuant to which Eagle was to lease from BankVest approximately 190 pieces of computer equipment (the "Equipment") over a period of 48 months.

2. The rent payments under the Lease were $11,940.61 per month.

3. At the time the Lease was entered into, each of the parties involved, including BankVest, knew that BankVest's

vendor, Nortel, would not complete production of approximately 20 items of the Equipment until several months later. Therefore, an arrangement was made between Eagle and Nortel for Nortel to deliver to Eagle loaner equipment that was similar to, but of a lesser grade than, the equipment that BankVest agreed to lease to Eagle. Nortel delivered the loaner equipment to Eagle in August 1999.

4. At or about the time that Nortel delivered the loaner equipment to Eagle, BankVest caused to be delivered to Eagle only some of the leased items that it was obliged to deliver. Excluded from the items delivered by BankVest were twenty critical items of equipment (the "Nondelivered Equipment"). The Nondelivered Equipment constituted 7 of 13 types of equipment to be delivered under the Lease and also accounted for sixty percent of the entire value of the leased goods.

5. The Nondelivered Equipment constituted the most critical components of the Equipment. Among the twenty items that had not been produced by the vendor were the computer modules and system software, while items of lesser value and importance such as power supply units, switches and cables had been produced and were delivered.

6. On December 17, 1999, an involuntary bankruptcy petition was filed against BankVest, before BankVest paid Nortel for any of the Equipment and before the Nondelivered Equipment was delivered.

7. Despite the passage of over four years, BankVest has still not delivered the Nondelivered Equipment nor has it offered to do so.

Appendix C

COUNT I
(Breach of Contract)

8. Eagle, Newark and MDAC incorporate the foregoing paragraphs.

9. BankVest breached its obligations under the Lease.

10. Eagle, Newark and MDAC have suffered damages as a result of BankVest's breach of the Lease.

COUNT II
(Fraud)

11. Eagle, Newark and MDAC incorporate the foregoing paragraphs.

12. BankVest sought to induce Eagle to sign an acceptance certificate, before delivery of the Equipment, by representing that BankVest would not claim that the acceptance certificate had any legal effect unless and until the Equipment was delivered in accordance with the Lease.

13. BankVest made the foregoing statements knowing that they were false or with reckless disregard for the truth.

14. Eagle relied on BankVest's material misrepresentations to its detriment by signing the acceptance certificate before receiving any of the Equipment.

15. Eagle, Newark and MDAC have suffered damages as a result of BankVest's misrepresentations.

Appendix C

COUNT III
(Promissory Estoppel)

16. Eagle, Newark and MDAC incorporate the foregoing paragraphs.

17. BankVest promised that it would not make use of the acceptance certificate until all of the equipment was delivered to Eagle.

18. Eagle, Newark and MDAC relied on the representations made by BankVest described in paragraph 17 hereof.

19. BankVest has and continues to use the acceptance certificate in breach of its promise to Eagle.

20. Eagle, Newark and MDAC have been harmed and continues to be harmed by BankVest's breach of its promise as described in paragraph 17 hereof.

COUNT IV
(Fraud)

21. Eagle, Newark and MDAC incorporate the foregoing paragraphs.

22. At the time that (i) BankVest and Eagle executed the Lease, (ii) Eagle executed the acceptance certificate and (iii) Newark and MDAC executed the guaranties, and for all times relevant thereafter, BankVest knew that it did not have the financial wherewithal to complete its obligations to deliver all of the equipment to Eagle as required by the Lease.

Appendix C

23. BankVest, in fact, did not have the financial wherewithal to deliver all of the equipment to Eagle.

24. Absent the concealment by BankVest of its dire financial condition, Eagle would not have entered into the Leases or signed the acceptance certificate. Similarly, without such concealment, the guarantors would not have signed the guaranties.

25. Eagle, Newark and MDAC have been harmed by the fraud committed by BankVest upon them.

COUNT V
(Rescission)

26. Eagle, Newark and MDAC incorporate the foregoing paragraphs.

27. BankVest's failure to deliver the Equipment constitutes a failure of consideration.

28. BankVest fraudulently induced Eagle to sign an acceptance certificate before any of the Equipment was delivered.

29. Eagle is ready, willing and able to return to BankVest so much of the Property as BankVest owns, is described in the Lease and has, in fact has been delivered or caused to be delivered by BankVest to Eagle thereunder.

30. Eagle, Newark and MDAC are entitled to rescission of the Lease and the guaranties.

WHEREFORE, Defendants respectfully request that the Court:

A. Enter judgment in favor of Defendants and against BankVest on Counts I through III of Plaintiff's Complaint;

B. Award damages to Eagle, Newark, and MDAC; and

C. Grant such further relief as the Court deems appropriate.

JURY DEMAND

Defendants demand a trial by jury on all counts so triable.

Respectfully submitted,

EAGLE INSURANCE COMPANY, NEWARK INSURANCE COMPANY and MATERIAL DAMAGE ADJUSTMENT CORP.

By their attorneys,

s/ Richard P. O'Neil
Joseph S.U. Bodoff (BBO #549116)
Evan Slavitt (BBO #466510)
Richard P. O'Neil (BBO #645214)
Bodoff & Slavitt LLP
225 Friend Street
Boston, MA 02114
(617)742-7300

Dated: April 1, 2004

[Certificate of Service Intentionally Omitted]

APPENDIX D — ANSWER AND COUNTERCLAIM OF NEWARK INSURANCE COMPANY, ET AL. DATED APRIL 1, 2004

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss — SUPERIOR COURT
C.A. NO. 03-4937-E

BANKVEST CAPITAL CORP.,

Plaintiff,

v.

NEWARK INSURANCE COMPANY, EAGLE INSURANCE COMPANY and MATERIAL DAMAGE ADJUSTMENT CORP.,

Defendants.

ANSWER, COUNTERCLAIM AND JURY DEMAND

AND NOW, come Newark Insurance Company ("Newark"), Eagle Insurance Company ("Eagle") and Material Damage Adjustment Corp. ("MDAC") (collectively, the "Defendants") and respond to BankVest Capital Corp.'s ("BankVest") Complaint as follows:

1. Defendants lack the knowledge to either admit or deny the allegations contained in this paragraph and, therefore, deny same.

2. Admitted.

3. Admitted.

4. Admitted.

5. The allegations contained in this paragraph constitute conclusions of law to which no response is required and, therefore, Defendants deny same.

6. The allegations contained in this paragraph constitute conclusions of law to which no response is required and, therefore, Defendants deny same.

COUNT I

7. The foregoing paragraphs are incorporated by reference.

8. Defendants admit the allegations contained in the first sentence of this paragraph. Defendants deny that Exhibit A to the Complaint is a true and correct copy of the Master Equipment Lease Agreement.

9. Defendants admit the allegations contained in the first sentence of this paragraph. Defendants deny that Exhibit B to the Complaint is a true and correct copy of Lease Schedule No. 002.

10. Defendants admit that Newark signed a document entitled "Acceptance Certificate." Defendants deny that Exhibit C to the Complaint is a true and correct copy of the

document entitled Acceptance Certificate. By way of further response, Newark executed the purported acceptance certificate before the equipment was received and in reliance on BankVest's misrepresentation that it was its normal practice to obtain acceptance certificates before it delivered the equipment and that it would not claim the acceptance certificate had any legal effect unless and until the equipment was delivered in accordance with the lease.

11. The documents speak for themselves and any attempt to summarize or characterize them is denied.

12. Defendants deny that certain of the items listed in the Lease were acquired for and received by Newark. As to the characterization of the Property as computer equipment, Defendants aver that the documents speak for themselves and any attempt to summarize or characterize them is denied. Defendants admit that Newark has not returned to BankVest any of the items received by Newark, but further avers that BankVest has not requested that Newark return the portion of the equipment that Newark did receive. Defendants further aver that Newark is ready, willing and able to return to BankVest so much of the Property as BankVest owns, but it is unwilling to deliver to BankVest the equipment that was delivered to Newark by the manufacturer as loaner equipment and which equipment additionally is not described in or made a part of the Lease.

13. The allegations contained in this paragraph constitute conclusions of law to which no response is required and, therefore, Defendants deny same.

14. Defendants lack the knowledge to either admit or deny the allegations contained in this paragraph and, therefore, deny same.

15. Denied.

16. Denied.

17. Denied.

18. Defendants admit that Newark has not returned to BankVest any of the items received by Newark, but further avers that BankVest has not requested that Newark return the portion of the equipment that Newark did receive. Defendants further aver that Newark is ready, willing and able to return to BankVest so much of the Property as BankVest owns, but it is unwilling to deliver to BankVest the equipment that was delivered to Newark by the manufacturer as loaner equipment and which equipment additionally is not described in or made a part of the Lease.

19. Defendants admit that Newark does not own the Property. The balance of the paragraph is denied.

COUNT II

20. Defendants incorporate the foregoing paragraphs.

21. Defendants admit the allegations contained in the first sentence of this paragraph. Defendants deny that Exhibit D to the Complaint is a true and correct copy of the guaranty signed by Eagle.

22. The allegations contained in this paragraph constitute conclusions of law to which no response is required and, therefore, Defendants deny same.

23. Denied.

24. Denied.

COUNT III

25. Defendants incorporate the foregoing paragraphs.

26. Defendants admit the allegations contained in the first sentence of this paragraph. Defendants deny that Exhibit E to the Complaint is a true and correct copy of the guaranty signed by MDAC.

27. The allegations contained in this paragraph constitute conclusions of law to which no response is required and, therefore, Defendants deny same.

28. Denied.

29. Denied.

AFFIRMATIVE DEFENSES

1. BankVest's claims are barred by the defense of failure of consideration.

2. BankVest's claims are barred by its failure to deliver the equipment that was the subject of the lease between the parties.

3. BankVest's claims are barred by the defense of promissory estoppel.

4. BankVest's claims are barred by the doctrine of waiver.

5. BankVest's claims are barred on the grounds that it fraudulently induced Newark to execute the so-called acceptance certificate.

6. The determination of whether BankVest may assume the Lease, pursuant to the provisions of section 365 of the Bankruptcy Code, has not been determined by final order. The foregoing claims are barred if BankVest ultimately rejects the Lease.

7. Count I is barred because BankVest breached the Lease before any alleged breach by Newark.

8. Counts II and III are barred because BankVest materially altered the terms of the underlying agreement without the consent of the guarantors.

COUNTERCLAIMS

Facts

1. On or about May 27, 1999, Newark entered into a Master Equipment Lease Agreement (the "Lease") with BankVest, pursuant to which Newark was to lease from BankVest approximately 190 pieces of computer equipment (the "Equipment") over a period of 48 months.

2. The rent payments under the Lease were $10,111.82 per month.

3. At the time the Lease was entered into, each of the parties involved, including BankVest, knew that BankVest's vendor, Nortel, would not complete production of approximately 20 items of the Equipment until several months later. Therefore, an arrangement was made between Newark and Nortel for Nortel to deliver to Newark loaner equipment that was similar to, but of a lesser grade than, the equipment that BankVest agreed to lease to Newark. Nortel delivered the loaner equipment to Newark in August 1999.

4. At or about the time that Nortel delivered the loaner equipment to Newark, BankVest caused to be delivered to Newark only some of the leased items that it was obliged to deliver. Excluded from the items delivered by BankVest were twenty critical items of equipment (the "Nondelivered Equipment"). The Nondelivered Equipment constituted 7 of 13 types of equipment to be delivered under the Lease and also accounted for sixty percent of the entire value of the leased goods.

5. The Nondelivered Equipment constituted the most critical components of the Equipment. Among the twenty items that had not been produced by the vendor were the computer modules and system software, while items of lesser value and importance such as power supply units, switches and cables had been produced and were delivered.

6. On December 17, 1999, an involuntary bankruptcy petition was filed against BankVest, before BankVest paid

Nortel for any of the Equipment and before the Nondelivered Equipment was delivered.

7. Despite the passage of over four years, BankVest has still not delivered the Nondelivered Equipment nor has it offered to do so.

COUNT I
(Breach of Contract)

8. Newark, Eagle and MDAC incorporate the foregoing paragraphs.

9. BankVest breached its obligations under the Lease.

10. Newark, Eagle and MDAC have suffered damages as a result of BankVest's breach of the Lease.

COUNT II
(Fraud)

11. Newark, Eagle and MDAC incorporate the foregoing paragraphs.

12. BankVest sought to induce Newark to sign an acceptance certificate, before delivery of the Equipment, by representing that BankVest would not claim that the acceptance certificate had any legal effect unless and until the Equipment was delivered in accordance with the Lease.

13. BankVest made the foregoing statements knowing that they were false or with reckless disregard for the truth.

Appendix D

14. Newark relied on BankVest's material misrepresentations to its detriment by signing the acceptance certificate before receiving any of the Equipment.

15. Newark, Eagle and MDAC have suffered damages as a result of BankVest's misrepresentations.

COUNT III
(Promissory Estoppel)

16. Newark, Eagle and MDAC incorporate the foregoing paragraphs.

17. BankVest promised that it would not make use of the acceptance certificate until all of the equipment was delivered to Newark.

18. Newark, Eagle and MDAC relied on the representations made by BankVest described in paragraph 17 hereof.

19. BankVest has and continues to use the acceptance certificate in breach of its promise to Newark.

20. Newark, Eagle and MDAC have been harmed and continues to be harmed by BankVest's breach of its promise as described in paragraph 17 hereof.

Appendix D

COUNT IV
(Fraud)

21. Newark, Eagle and MDAC incorporate the foregoing paragraphs.

22. At the time that (i) BankVest and Newark executed the Lease, (ii) Newark executed the acceptance certificate and (iii) Eagle and MDAC executed the guaranties, and for all times relevant thereafter, BankVest knew that it did not have the financial wherewithal to complete its obligations to deliver all of the equipment to Newark as required by the Lease.

23. BankVest, in fact, did not have the financial wherewithal to deliver all of the equipment to Newark.

24. Absent the concealment by BankVest of its dire financial condition, Newark would not have entered into the Leases or signed the acceptance certificate. Similarly, without such concealment, the guarantors would not have signed the guaranties.

25. Newark, Eagle and MDAC have been harmed by the fraud committed by BankVest upon them.

Appendix D

COUNT V
(Rescission)

26. Newark, Eagle and MDAC incorporate the foregoing paragraphs.

27. BankVest's failure to deliver the Equipment constitutes a failure of consideration.

28. BankVest fraudulently induced Newark to sign an acceptance certificate before any of the Equipment was delivered.

29. Newark is ready, willing and able to return to BankVest so much of the Property as BankVest owns, is described in the Lease and has, in fact has been delivered or caused to be delivered by BankVest to Newark thereunder.

30. Newark, Eagle and MDAC are entitled to rescission of the Lease and the guaranties.

WHEREFORE, Defendants respectfully request that the Court:

A. Enter judgment in favor of Defendants and against BankVest on Counts I through III of Plaintiff's Complaint;

B. Award damages to Newark, Eagle and MDAC; and

C. Grant such further relief as the Court deems appropriate.

Appendix D

JURY DEMAND

Defendants demand a trial by jury on all counts so triable.

NEWARK INSURANCE COMPANY, EAGLE INSURANCE COMPANY and MATERIAL DAMAGE ADJUSTMENT CORP.

By their attorneys,

s/ Richard P. O'Neil
Joseph S.U. Bodoff (BBO #549116)
Richard P. O'Neil (BBO #645214)
Bodoff & Slavitt LLP
225 Friend Street
Boston, MA 02114
(617) 742-7300

Dated: April 1, 2004

[Certificate of Service Intentionally Omitted]

(3)

MAY 24 2004

No. 03-1442

IN THE

Supreme Court of the United States

EAGLE INSURANCE COMPANY and
NEWARK INSURANCE COMPANY,

Petitioners,

v.

BANKVEST CAPITAL CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

JOSEPH S.U. BODOFF*
EVAN SLAVITT
RICHARD P. O'NEIL
BODOFF & SLAVITT LLP
225 Friend Street
Boston, MA 02114
(617) 742-7300

* *Counsel of Record*

Attorneys for Petitioners

187612

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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ARGUMENT

I. The Assertion That There Is No Conflict in the Circuits Is Plainly Wrong

Not surprisingly, BankVest Capital Corp. ("BankVest") tries to construct an argument that the First Circuit was wrong when it announced its direct disagreement with the Ninth Circuit, saying in the plainest language possible: "We disagree with the Ninth Circuit. . . ." Petition for Certiorari ("Petition") App. at 2a.[1] It rests its argument on the notion that the First Circuit's opinion was, in some fashion, either limited to its facts or created by its unique facts.

The principal problem for BankVest is that there is absolutely no support for its supposition. Neither the First Circuit nor the Ninth Circuit limited the application of their analyses in any way. *See In re Claremont Acquisition Corp.*, 113 F.3d 1029 (9th Cir. 1997). Both Circuits' exegesis of 11 U.S.C. § 365(b)(2)(D) are based on fundamental principles of statutory interpretation and neither case attempts to limit its holding. Any attempt to limit them to their facts would be dismissed by the district and bankruptcy courts in their respective jurisdictions. Indeed, as noted in the Petition, bankruptcy courts in other jurisdictions have advanced both the Bankruptcy Court's and the Bankruptcy Appellate Panel's decision in this case as opinions of general authority. *See, e.g., In re Williams*, 299 B.R. 684 (Bankr. S.D. Ga. 2003) (citing the *BankVest* Bankruptcy Appellate Panel decision), *In re Walden Ridge Development, LLC*, 292 B.R. 58 (Bankr. D.N.J. 2003) (citing the *BankVest* Bankruptcy Court decision).

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1. Indeed, BankVest does not even mention the First Circuit's explicit statement of disagreement until footnote 15 in the next section of its Opposition.

Further undermining BankVest's attack is the lack of any logical connection between its dissection of the facts and the resulting decisions. It is, of course, true that each case arose in different circumstances – commonplace in cases that reach this Court. Nonetheless, BankVest does not explain (perhaps because it cannot do so) ***how*** the differences in facts lead to the two different conclusions. The core question is whether the debtor was required to cure non-monetary defaults before assuming the executory contract; the availability of potential remedies does not change that point of decision. Indeed, as discussed in the next section, the state court litigation to which BankVest gives pivotal effect does not, will not, and cannot address the issue before the bankruptcy court.

Any fair reading of *Claremont* and the decision below cannot come to any conclusion other than this: the circuits are in direct and irreconcilable conflict.

II. Additional Case Law Is Not Desirable and Is Likely to be Problematic

There are indeed occasions in which this Court has deferred resolution of disputes to allow the case law to develop. This is not one of those occasions. First, this is not a situation in which an entire statute is being construed and further development of its potential structures is necessary to determine if a conflict is real or not. Here there is a discrete provision of the Bankruptcy Code which is at issue.

Second, as discussed in the Petition, there is no assurance that other circuits will line up on one side or the other, eventually persuading the minority to revisit the issue.

In criticizing the possibilities set out in the Petition, BankVest misses the point. It is not that those other positions have been definitively adopted that is important, it is that they exist, would be possible interpretations, and are likely to gather some support. This will leave the circuits hopelessly fragmented.

BankVest has no response. In its discussion, BankVest never explains what such development might be or how it might help this Court. Its argument is built on bold assertion rather than reasoned explanation. In order to disguise its inability to make a cogent point, BankVest quotes from an opinion by Justice Stevens concerning a certiorari petition that specifically makes clear that all such commentary on substantive law in opinions respecting petitions for certiorari are dicta and have no precedential value – including that very opinion. The language that BankVest fails to draw to this Court's attention makes that clear:

> One characteristic of all opinions dissenting from the denial of certiorari is manifest. They are totally unnecessary. They are examples of the purest form of dicta, since they have even less legal significance than the orders of the entire Court which, as Mr. Justice Frankfurter reiterated again and again, have no precedential significance at all.
>
> Another attribute of these opinions is that they are potentially misleading. Since the Court provides no explanation of the reasons for denying certiorari, the dissenter's arguments in favor of a grant are not answered and therefore typically appear to be more persuasive than most other opinions. Moreover, since they often omit any

> reference to valid reasons for denying certiorari, they tend to imply that the Court has been unfaithful to its responsibilities or has implicitly reached a decision on the merits when, in fact, there is no basis for such an inference.

Singleton v. Commissioner, 439 U.S. 940, 944-945 (1978) (Justice Stevens, Opinion Regarding the Denial of a Petition for Writ of Certiorari). There is something wrong with citing as authority to this Court for a proposition of substantive law a decision whose author explicitly cautioned against so doing.

As pointed out in the Petition, this issue has been addressed not only by at least two courts of appeals, but by several other lower courts. Put simply, there is no further development that will assist this Court or the lower courts.

III. This Case Is Not Moot

At several points in its brief, BankVest seemingly asserts that this case is moot. It first makes that point when it states that "Petitioners do not actually state that the decisions below are wrong. . . ." Brief in Opposition at 20-21. In making this assertion, BankVest apparently neglects the admonition of Sup. Ct. Rule 10 which makes clear that arguments about the correctness *vel non* of the decision below are not the focus of a proper petition. To avoid, however, any ambiguity, it is petitioners' position that the decisions below were wrong.[2]

---

2. While it is understandable that BankVest feels it necessary to grant such little credence to the position of Eagle and Newark before this Court, their argument is disingenuous. As noted by

(Cont'd)

Another theory of mootness is that the state court proceeding will resolve all issues. This is simply incorrect. What the state court action will decide is which party owes which other party money. It will not decide – because it cannot – the issues of cure and assumption. A motion and stipulation filed with and approved by the Bankruptcy Court makes this clear. Attached as Appendix A and Appendix B hereto, respectively are Motion to Approve Stipulation Modifying the Plan Injunction, and Stipulation Modifying Plan Injunction. As stated in therein, the Stipulation was entered into in order to allow Eagle and Newark to assert what arguably are compulsory counterclaims in litigation instituted in state court by BankVest. The Stipulation and Motion recognize that the Cure Claims are outstanding and that the state court litigation will determine the *amount* of the claims that each party has against the other. The priority of those claims, which is at the very heart of the proceedings before this Court, will be determined by the Bankruptcy Court after a decision by this Court.

IV. BankVest's Attack on the Motives of Petitioners Is Wrong and Irrelevant

As it has throughout this litigation, BankVest spends an inordinate amount of time attacking the motives of petitioners rather than addressing the merits of the disputes. Several points should be made about this ad hominem attack. First,

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(Cont'd)

the First Circuit, the issue now before this Court was raised by the Bankruptcy Court, not BankVest. It is clearly an issue that was not so clear to BankVest at the time the Bankruptcy Court asked the parties to submit their briefs on the issue of whether the claims asserted by Eagle and Newark, if proved, rose to the level of cure claims.

petitioners disagree in the strongest terms. A detailed chronology is not appropriate for this filing, but it should be made clear that at all times and in every court, petitioners and their counsel have made good faith filings solely to vindicate their legal rights. While BankVest may be inconvenienced by the Petition, it is the right of every litigant to bring to this Court's attention matters that are potentially worthy of review.

Second, although BankVest has brought its tired plaints to every court, it has been rebuffed in every court. Not a single court has found that any of the Petitioners' filings were in other than good faith and based on reasoned arguments of law.

Finally, these personal attacks are irrelevant. If this matter is worthy of consideration by this Court, the character of the person or company bringing the matter to its attention is unimportant. In sum, BankVest's innuendo is both irrelevant and not worthy of this Court's attention.

V. BankVest's Attempt to Minimize the Importance of This Issue Fails

At the core of BankVest's assertion that this issue is not important is its claim that a prior decision of this Court, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 79 L. Ed. 2d 482, 104 S. Ct. 1188 (1984), renders the matter academic. Brief in Opposition at 22. Plucking one sentence out of the *Bildisco* opinion, BankVest asserts that the case mandates that a debtor assuming an executory contract must perform all of its obligations under the contract, including all non-monetary obligations. Such a reading would render the First Circuit's decision directly contrary to this Court's precedent.

Thus, either the First Circuit and the Ninth Circuit engaged in pointless analysis because this Court has already decided the matter, or, perhaps more likely, *Bildisco* does not stand for the proposition asserted by BankVest. Once that prop has been knocked from its argument, BankVest's glaring failure to cite to any other case for that proposition only underlines the weakness of its critique.

The facts remain as set forth in the Petition: this is an important issue and a great deal turns on its resolution.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court grant review of this matter.

Respectfully submitted,

JOSEPH S.U. BODOFF*
EVAN SLAVITT
RICHARD P. O'NEIL
BODOFF & SLAVITT LLP
225 Friend Street
Boston, MA 02114
(617) 742-7300

Attorneys for Petitioners

* *Counsel of Record*

APPENDIX

APPENDIX A – MOTION TO APPROVE STIPULATION MODIFYING PLAN INJUNCTION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

Chapter 11
Case No. 99-47760-JBR

In re

BANKVEST CAPITAL CORPORATION,

Debtor

MOTION TO APPROVE STIPULATION MODIFYING THE PLAN INJUNCTION

TO THE HONORABLE JOEL B. ROSENTHAL, BANKRUPTCY JUDGE:

AND NOW, come Eagle Insurance Company ("Eagle"), Newark Insurance Company ("Newark"), Material Damage Adjustment Corp. ("MDAC"), Ark CLO 2000-1, Limited ("Ark") and BankVest Capital Corporation (the "Debtor"), by Stephen Gray in his capacity as the Liquidating Supervisor appointed under the Fifth Amended Joint Liquidating Plan of Reorganization, As Modified (the "Plan") and move this Court for approval of a stipulation modifying the plan injunction to permit Eagle, Newark and MDAC to assert counterclaims against the Debtor in actions pending in the Massachusetts Superior Court. In support of this motion, the parties state as follows:

Appendix A

1. On May 31, 2001, this Court entered an Order Approving Supplemental Disclosure Statement And Confirming Fifth Amended Joint Liquidating Plan Of Reorganization, As Modified, Of Debtor And Creditors' Committee (the "Confirmation Order").

2. Pursuant to the Confirmation Order and the Plan, there is in place an injunction (the "Plan Injunction") to the same extent and with the same effect as the stay imposed by Section 362 of the Bankruptcy Code and such injunction remains in effect until this case is closed pursuant to Section 350 of the Bankruptcy Code.

3. On October 24, 2003, the Debtor filed the following two actions against Eagle and Newark in the Massachusetts superior court: *BankVest Capital Corp. v. Eagle Insurance Company, et al.*, Suffolk Superior Court, Civil Action No. 03-4936-C and *BankVest Capital Corp. v. Newark Insurance Company, et al.*, Suffolk Superior Court, Civil Action No. 03-4937-E (collectively, the "State Court Actions"). In its Complaints, the Debtor seeks to recover from Eagle and Newark for, among other things, payments allegedly due under equipment leases (the "Leases") entered into between the Debtor and Eagle and Newark prior the date of the petition initiating this case.

4. Eagle, Newark and MDAC intend to file counterclaims against the Debtor in the State Court Actions arising primarily out of the Debtor's failure to deliver a portion of the equipment that was the subject of the Leases.

5. As this Court is well aware, Eagle's and Newark's claims arising out of the Debtor's failure to deliver the equipment are also the subject of requests for cure costs (the "Cure Claims") and proofs of claim (the "Claims") filed by Eagle and Newark in this Court. The Cure Claims are the subject of an appeal currently pending before the First Circuit. As to the Claims, a hearing is presently scheduled for April 8, 2004.

6. Eagle, Newark and MDAC seek relief from the Plan Injunction in order to litigate their counterclaims against the Debtor in the State Court Actions on the grounds that they risk waiving such claims if they are not asserted in the State Court Actions.

7. The parties have stipulated to the following terms of relief from the Plan Injunction: (i) the state court final judgments on the claims of Eagle, Newark, or MDAC against the Debtor, if any (after all appeals or the expiration of all appeals periods) shall be dispositive of the issues and claims actually determined and shall determine the dollar amount of such claims, if any, against the estate; (ii) notwithstanding anything to the contrary, the Bankruptcy Court shall retain exclusive jurisdiction to determine the priority of such claims, if any, against the estate; and (iii) proceedings on the claims of Eagle and Newark against the estate, which are now set for hearing on for April 8, 2004, shall be continued generally pending determination of claims asserted in the State Court Actions.

8. The parties have entered into a stipulation (the "Stipulation") memorializing the terms described herein,

which is submitted herewith as Exhibit A. By this motion, the parties seek the Court's approval of the Stipulation.

WHEREFORE, it is respectfully requested that the Court enter an Order approving the Stipulation, continuing generally the hearing on the Debtor's objection to the Claims, and granting such other and further relief as may be appropriate.

EAGLE INSURANCE COMPANY, NEWARK INSURANCE COMPANY and MATERIAL DAMAGE ADJUSTMENT CORP.
By their attorneys,

s/ Richard P. O'Neil
Joseph S.U. Bodoff
(BBO #549116)
Richard P. O'Neil
(BBO #645214)
Bodoff & Slavitt LLP
225 Friend Street
Boston, MA 02114
(617) 742-7300

BANKVEST CAPITAL CORP, By STEPHEN GRAY In His Capacity As THE LIQUIDATING SUPERVISOR
By its attorneys,

s/ Andrew G. Lizotte
Andrew G. Lizotte
(BBO #559609)
Hanify & King, P.C.
One Beacon Street
Boston, MA 02108-3415
(617) 226-3415

Appendix A

ARK CLO 2000-1
LIMITED
By its attorneys,

s/ Frederic D. Grant, Jr.
Frederic D. Grant, Jr.
(BBO #543115)
Grant & Roddy
44 School Street, Suite 400
Boston, MA 02108
(617) 248-8700

and

Jay L. Gottlieb
Brown Raysman Millstein
Felder & Steiner LLP
900 Third Avenue
New York, NY 10022
(212) 895-2636

Dated: February 23, 2004

APPENDIX B – STIPULATION MODIFYING PLAN INJUNCTION

UNITED STATES BANKRUPTCY COURT DISTRICT OF MASSACHUSETTS

Chapter 11
Case No. 99-47760-JBR

In re

BANKVEST CAPITAL CORPORATION,

Debtor

STIPULATION MODIFYING PLAN INJUNCTION

This stipulation (the "Stipulation") is made and entered into as of this 24th day of February, 2004 by and among, Eagle Insurance Company ("Eagle"), Newark Insurance Company ("Newark"), Material Damage Adjustment Corp. ("MDAC"), Ark CLO 2000-1, Limited ("Ark") and BankVest Capital Corp. (the "Debtor"), by Stephen Gray in his capacity as the Liquidating Supervisor appointed under the Fifth Amended Joint Liquidating Plan of Reorganization, As Modified (the "Plan"). For purposes of this Stipulation, Eagle, Newark, MDAC, Ark and the Debtor shall be referred to, collectively, as the "Parties," and individually as a "Party."

Recitals

WHEREAS, on May 31, 2001, the Bankruptcy Court entered the Order Approving Supplemental Disclosure Statement And Confirming Fifth Amended Joint Liquidating

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Plan Of Reorganization, As Modified, Of Debtor And Creditors' Committee (the "Confirmation Order");

WHEREAS, pursuant to the Confirmation Order and the Plan, there is in place an injunction (the "Plan Injunction") to the same extent and with the same effect as the stay imposed by Section 362 of the Bankruptcy Code and such injunction remains in effect until this case is closed pursuant to Section 350 of the Bankruptcy Code;

WHEREAS, on October 24, 2003, the Debtor filed the following two actions against Eagle, Newark and MDAC in the Massachusetts superior court: *BankVest Capital Corp. v. Eagle Insurance Company, et al.*, Suffolk Superior Court, Civil Action No. 03-4936-C and *BankVest Capital Corp. v. Newark Insurance Company, et al.*, Suffolk Superior Court, Civil Action No. 03-4937-E (collectively, the "State Court Actions");

WHEREAS, the State Court Actions assert various claims against Eagle, Newark and MDAC relating to or arising out of the equipment leases ("Leases") entered into between the Debtor and Eagle and the Debtor and Newark;[1]

WHEREAS, Eagle, Newark and MDAC desire to assert counterclaims against the Debtor in the State Court Actions; and

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1. Ark is responsible for adjudicating such claims in accordance with the Order approving assumption of executory contracts with Eagle and Newark.

Appendix B

WHEREAS, Eagle and Newark have filed claims against the Debtor with this Court;

NOW THEREFORE, in consideration of the mutual covenants and promises set forth herein, the Parties agree and stipulate as follows:

1. The Plan Injunction shall be modified to permit Eagle, Newark and MDAC to assert any and all claims, counterclaims or defenses that they may have against the Debtor in the State Court Actions.

2. The state court final judgments on the claims of Eagle, Newark, or MDAC against the Debtor, if any (after all appeals or the expiration of all appeals periods) shall be dispositive of the issues and claims actually determined and shall determine the dollar amount of such claims, if any against the estate.

3. Notwithstanding anything to the contrary, the Bankruptcy Court shall retain exclusive jurisdiction to determine the priority of such claims, if any, against the estate.

4. Proceedings on the claims of Eagle and Newark against the estate, which are now set for hearing on for April 8, 2004, shall be continued generally pending determination of claims asserted in the State Court Actions.

IN WITNESS WHEREOF, the signatories below, being fully authorized and empowered to bind the Parties to this Stipulation, have authorized and executed this Stipulation.

Appendix B

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